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THE
V A K E E L S' G U I D E
OR
A COMPENDIUM OF THE LAWS
MOST IMPORTANT
FOR THE EFFICIENT DISCHARGE
OF THE PROFESSIONAL DUTIES.

COMPILED AND ARRANGED

BY

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TO

ROWLAND WINSLEY CHATFIELD, Esq.,

Chief and Session Judge of

Mangalore.

This Volume

IS

With Permission

Respectfully Dedicated

BY

His Most Obedient

and humble Servant,

T. SUBBANNACHARIAR

PREFACE TO THE FIRST EDITION.

THE well-known profession of Vakeels is very important and delicate. They have to plead and manage various causes ; and are called upon to extenuate to-day what they aggravated yesterday, to attach more and less weight at different times to the same kind of evidence, and to impugn and enforce the same principle, according as the interests of their clients may require. A Judge, or any one whose business is to ascertain truth, has *merely* to decide according to the *preponderance* of the reasons ; but the Vakeels' business is to set forth, as forcibly as possible, those on their own side. There are many Vakeels who feel no scruple whatever about any act that they think beneficial to their clients. They suppose that, to serve them by all expedient means, or to protect them at all hazards and costs to all others (even the party already injured), is the highest and most unquestionable of their duties ; and that they need not regard the alarm, the suffering, the torment, and the destruction which they may bring upon any others. They protest with solemnity their own full conviction of the justice of their clients' cause, though they feel no such conviction at all,—feign various emotions such as pity, indignations, moral approbations, or disgust, or contempt, when they neither feel anything of the kind nor believe the case to be one that justly calls for such emotions. They often entrap or mislead, revile, insult, and calumniate persons whom they believe in their heart to be respectable.

The right (and most proper) course to be adopted by respectable Vakeels, is to follow the example of Sir MATTHEW HALE, who, it has been recorded, whenever he was convinced

to explain to his client the grounds of that conviction. He abhorred the practice of misreciting evidence, quoting precedents in books falsely or unfairly, so as to deceive ignorant Juries or inattentive Judges. He adhered to the same scrupulous sincerity in his pleadings which he observed in other transactions of life. It is a great dishonour for a man that, for the sake of little money, he should persuade himself to say otherwise than he thinks. "Lying lips are an abomination unto the Lord." "Woe unto them that call evil good, and good evil; that put darkness for light, and light for darkness; bitter for sweet, and sweet for bitter."—(*License of Council, cited in Whately's Rhetoric, pp. 163—165*).

There are also some Vakeels who, with a view of obtaining wealth and credit for themselves and their families, wilfully encourage litigious disputes, give flattering, but unsound advice to their clients, and plead causes with specious elegance but unsupported by accurate knowledge of law. It is therefore their interest no less than their duty, to acquire, in the first instance, a competent knowledge of law by perusing law books. Mr. Norton, (in the Preface to the 2nd edition of his *Law of Evidence*, page 9) recommends a number of valuable law books for practitioners; but as most of the Vakeels in the Mofussil are hardly able to procure and read such high priced and voluminous works, I thought it most desirable to compile this Manual, pointing out to the Vakeels the laws which regulate their professional conduct and duties (which, to the vast majority of Vakeels, is wholly unknown), and placing them in possession of what is indispensably necessary to discharge their professional duties efficiently.

I hope that this Manual will not only serve as a book of reference to District Moonsiffs and public servants, but also help candidates for the office of District Moonsiff and Pleader, who, according to the recent rules of Government dated 4thth February last, are required to pass examination in the Laws of Evidence, Contract, Torts, and Measure of Damages, which have been treated of in this work, besides an Appendix of the Rules of Practice of Courts, Special Rules for Oral Pleadings, and a List of Legal Maxims and Principles.

Should this Manual meet with the approbation of the readers, as expected and even expressed by some of the subscribers to it on perusal of the Prospectus published by me on the 16th December last, I shall undertake translating it into Canarese.

The readers are requested to make the corrections mentioned in the List of Errors, and excuse any further errors or omissions which, notwithstanding my utmost care, have escaped detection.

In conclusion, I beg to express my grateful acknowledgments to my immediate superior, Mr. Chatfield, the Civil and Session Judge of Mangalore, to whom I am deeply indebted for his kindness in having revised and corrected several parts of this Manual; and I should not forget to record my sincere thanks to Messrs. Norton and Broom, Barristers-at-Law, from whose valuable works I have derived much aid in compiling this Manual.

T. S.

MANGALORE, *September* 1862.

PREFACE TO THE SECOND EDITION.

INDEED, in no profession is success so much dependent on individual ability and exertion, as in the profession of law. "It is a profession," says Sir ADAM BIDDLESTON in addressing the students at the Convocation of the University of Madras, "which holds out to you many substantial rewards; but, be assured, it yields its prizes only to those who fairly win them by industry, ability, and integrity. In the practice of this profession, you must neither forget your duty to your clients, nor your duty to yourselves. The one demands of you that you should give to your client the full benefit of your knowledge, experience, and judgment, sparing no pains to render these as perfect as you can;—the other demands of you that you should never, even from zeal for your client, still less from any motive of self-interest, stoop to any dishonorable or unworthy practice. I am afraid that zeal for the client is not generally, in this country, a very strong feeling; and it would not, I think, often be sufficient in itself to tempt the practitioner far astray from the right path, as it has sometimes done elsewhere; but, alas! the baser motive of self-interest is strong enough everywhere; and, in this country, litigation is generally so interwoven with fraud and falsehood, that you will need to be ever on your guard against involving yourselves in any complicity with the misdeeds of your clients. There are, I believe, some persons who can hardly persuade themselves that the profession of advocacy can ever be consistent with personal honor, but this opinion is probably influenced mainly by mistaken notions of what the Advocate's duty is, or by the recollection of some particular instance or instances—very rare, and quite exceptional—in which the individual Advocate has forgotten his duty and abused his

privilege. So easy is it, Gentlemen, for a very small number of evil-doers to bring discredit on any brotherhood to which they belong. But I am convinced that it is enough to appeal to the character of the English Bar, as a body, in refutation of the opinion to which I have referred. There is no doubt that the view in which that body now entertains in the Advocate's duty. On a recent occasion it was exhibited in a very marked manner. The English Bar were entertaining an illustrious French Advocate, M. Berryer, and in the ancient Hall of the Middle Temple there was a very large assembly of English Advocates and Judges to do honor to their guest. Amongst those present was one venerable in age and ladden with honors. * * * He gave expression to a sentiment which met with no response from that great meeting. Not even the admiration and respect felt for Lord Brougham could extract any token of assent to his opinion when he said that 'the first great quality of an Advocate was to reckon everything subordinate to the interests of his client.' But when the present Lord Chief Justice of England rose shortly afterwards, and, in terms of eloquent indignation, repudiated the notion that the Advocate was under any obligation to sacrifice everything to the interests of his client, the hall rung with cheers. 'Much as I admire,' said he, 'the great abilities of M. Berryer, to my mind his crowning virtue, as it ought to be that of every Advocate, is, that he has, throughout his career, conducted his cases with untarnished honor. The arms which an Advocate wields he ought to use as a warrior, not as an assassin. He ought to uphold the interests of his client *per fas*, but not *per nefas*. He ought to know how to reconcile the interests of truth and justice.'

"Act, Gentlemen, upon these principles. Remember that your vocation is to aid in the administration of justice, and equally, whether you are Advocates or Judges, let your motto be '*Fiat Justitia*.'"

The success of this work, and the opinion thereon expressed by the public at large consisting of the Honorable

Members and several Judicial functionaries in the Madras and Bombay Presidencies, as well as a great demand for the work, obliged me to undertake this second edition, which I have carefully revised and corrected according to the latest rulings and decrees of the High Court. That part of the Vakeel's duties which treats the Oral Pleading, and the List of Legal Maxims, Proverbs, &c., have been greatly improved and enlarged. For the latter, I am much indebted to Messrs. H. G. BOHN and J. HIGGINBOTHAM, from whose works I have chiefly collected them.

In conclusion, I beg to observe that some of the readers of the first edition of this work seem to have entertained a little doubt as to the correctness of what has been said in its Preface about the conduct and abilities of the Mofussil Vakeels. To remove such doubts, I shall gladly lay before them the following observations made by a Correspondent in the *Madras Times*, dated 9th March 1864 :—

“A suitor dependent on his native Vakeel oftener suffers than otherwise from his stupidity and ignorance, and from what I may call his *over-pleading* and *over-advocacy*. The native Vakeel presses *every weak point* of his case on the Court, and flings on its face, as evidence, every irrelevant stuff that his client may choose to put before him, even matter *that* does him positive harm; and with an opposing Pleader of no greater intelligence or ability, the presiding Judge is left without any help to arrive at the merits of the case, and no wonder allows these stuffs to creep into the record and perhaps finds out, when too late, if at all, that he has to go through and observe upon a mass of matter which has no more bearing on the land dispute before him, than on the adultery case tried the other day; matter which would have been nipped in the bud but for want of objection taken at the proper time by the opposing Pleader.

“The Vakeel is no *adviser* of his client, but literally his mouth-piece. He does not understand such a thing as advising, and much less can he imagine that it is as often his business to deprecate legal proceedings in cases submitted to him, as to recommend such proceedings; and he little knows that he is as much entitled to a fee for an opinion adverse to an intended suit, as for one in its favour. If his friend wants to bring a suit, ‘Bring it,’ says he. If he wants to appeal against a decree, ‘By all means,’ says he. When asked by the Judge how he consented to such and such trash being adduced as evidence, his answer frequently is, ‘My client asked me to do so, he is a poor man, he has a just case, and the Court must have compassion on him.’ This is the climax of his eloquence. It is from a pathetic appeal to the Judge’s compassion, it is from a comparative examination of the circumstances in life of the two parties, that the Vakeel hopes to win the

sympathy of the Court for his client. By way of supplementing this appeal to the finer feelings, this address to the emotions of the Judge's heart, he produces his client, who falls prostrate at the Judge's feet, pours down a flood of tears, and sets up a piteous and vociferous prayer for justice, accompanying it with such adulatory doses regarding his powers of discernment and justice as cannot but make him think that he is far above mortals, if not quite a god. He is the very mirror of justice, can detect truth at a glance, and from the very physiognomy of the two parties. He is a Vishnu or a Siva, and a thousand other deities. All this he considers very legitimate pleading. He presses every point, or rather everything, (for there is no *point* at all in the thing) that his client wishes him to say, and the more irrelevant it is, the greater the earnestness with which it is dwelt on, so as effectually to keep out of view points or facts that really tell for his client. His pleading, if it may be so called, more resembles the talk of an unsophisticated villager relating his grievances to his village head, who personally knew every fact connected with the story, than the address of an advocate who has endeavoured to knead it of all its weakening, irrelevant, and injurious matter, so as to present its strong features to one who can form no judgment on the case, except from the facts admissible in evidence. He does not understand the art of skipping over and much less giving up a bad or inconvenient position or argument, and is little aware how much a cause sometimes gains by the advocate surrendering an untenable part of his defence, or by admitting an unimportant fact, so as to concentrate all available force on a position more clearly defensible, and the maintenance of which is sufficient for his victory. He would give up nothing, defend and insist on everything, and a contrary course he takes as one of conscious weakness and not of confident strength.

"Such, Mr. Editor, is the class and quality of advocates to whom the Mofussil population are obliged to trust their cases, men as ignorant as themselves; and who can for a moment doubt that their supercession by men of a superior order, by English and native gentlemen of legal education and standing, would not only be a great advantage to the Mofussil suitor, but would prove of immense help to the Judge? And I for one would rejoice at their settlement in some of the Mofussil stations. From some little experience I have had of the manner in which these gentlemen handle their cases, I can well realize to my mind the very great advantages that would result to all parties concerned, the Judge included, if some of the Vakeels and advocates practising at the High Court bar could be induced to settle at, or make more frequent visits to, the Mofussil, than they now do. I can imagine how easy the Judge's work would then become, aided by a bar formed by such men, and I can predict with safety that there would then be fewer appeals to the High Court than there now are. Let it not be supposed that the speculation would be a doubtful one to themselves, however profitable to the suitor to have such lawyers near his door; but I can assure them that the ordinary Vakeel of a District Court, such as he is, demands and gets most fabulous sums from the suitor, compared with the kind of assistance he renders, and that more money goes into the hands of these Vakeels and officers of the Court than an ordinary English lawyer would hope to make

for himself; for it must be remembered that, under the present state of things when the Vakeels are so sadly wanting in legal qualifications, the ministerial officers of the Courts necessarily supply their shortcomings by aiding the Judge, and, of course, get paid for this extra work in the shape of bribes. Unaided by a trained bar, the Judge cannot but fall back on his Gomastah, sharp and intelligent as some of them are, for assistance in several ways; for the system in the Mofussil imposes a good deal of the clerk's work on the Judge, and the Judge, unhelpt by a bar worthy of the name, or by a Jury, however independent he may be disposed to be, cannot avoid getting an occasional suggestion on a point of substantive law or procedure, if not actually on the merits of the case itself, from his clerk. Government will not relieve the Judge of his clerical functions by making the clerk do his proper business, such as signing of processes and sundry other jobs which in every English Court devolve on him; but they have no objection to indirectly making him the assistant and adviser of the Judge in his *judicial* functions, for such is often a Sheristadar to a Mofussil Judge under the circumstances, especially if the Judge happens to be a Covenanted European who is suddenly raised to the bench from a Sea Custom Collectorship, or Post Master Generalship. With gentlemen thus unexpectedly metamorphosed, their clerks cannot but be the real Judges for some time at least. In brief, the Judge does much of the work which his *Sheristadar* ought to do, and the latter in return helps the former in his *proper* duties. Our far-sighted Government will not trust a Sheristadar with the signing of a number of every-day processes, but have no objection to his really aiding the Judge in his own proper work. The consequence of this state of things is, that the Judge is overworked, does his work in a slovenly manner, depends, more or less, upon his by-standing clerk for assistance, which ought to be given by an intelligent bar, and fails to command for his decisions that popular confidence, as to their independence, which they ought to carry; these decisions being regarded as more or less dictated by the influence brought to bear on the Judge through a subordinate officer of the Court.

"I say, then, that the formation of an educated bar, as well as relieving the Judge of all clerical duties, is emphatically the grand desideratum for the improvement of the administration of justice in the Mofussil. The latter is a measure which would cost Government nothing. They have only to authorize by legislation the head servants of the Courts to do the work which they ought, and thus leave the Judge leisure for the study of law and for purposes strictly judicial. As to the formation of the bar, there appears to be some difficulty. The notion in the Mofussil seems to be that it is left to the Judge to license or not a new applicant for admission, and applications are, I hear, refused on the ground that there are already too many compared with their income, or for some such reason. In the first place, I doubt whether any Judge can thus limit the number of men to whom people^c should go for legal advice. The Judge is not bound to see a decent income secured to each Vakeel. This is no business of his. Neither is it right to deprive the public of the advantage of choosing, for their advisers, among a number of men, provided they are passed. Instead, therefore, of confining

the area of selection, I think every Judge of a District Court should be advised, and, indeed, ordered by the High Court to invite applicants qualified to practice at the High Court, to enrol themselves as Vakeels of the lower Courts. Some of the English and native lawyers of position at Madras, some of the native B. L.'s and other men passed as Moonsiffs and Vakeels and possessing a high degree of English scholarship, though no Bachelors of Law, might thus be brought into the Mofussil Courts, and the old race of Vakeels gradually got rid of, unless they stick on as assistants or Attorneys to the new set of men. I may not be very definite in my remarks, but however poor my suggestions of a remedy, no language can be too strong to depict the sad miscarriage of justice that takes place every day in consequence of the mischievous ignorance of the men who have now the conduct of litigation in the Mofussil. It may be said that, amidst all this tirade against poor Vakeels, I have taken for granted that the Judges themselves are everything that could be desired. The necessity of appointing men of legal training to the Mofussil bench has been so often urged, and the policy of at least confining to the department even non-professional civilians once appointed to judicial office has been so frequently insisted on without much effect, that I feel how infinitesimally little my weak voice is likely to add to an exposure of the evils incident to the present system under which a Postmaster all his life finds himself suddenly gazetted as Judge of a Zillah, even against his will. It would unquestionably be a reform of the most beneficial character, if it were made the rule that the Chief Judge of every District should be a lawyer like Mr. Collett; but when will the Government do this? Not for the next quarter of a century, I opine; but much might be done for the cause of justice by improving the *personnel* of the bar, and this, I trust, is in the power of the Judges of the High Court, composed, as it at present is, of men learned in the law, with their worthy coadjutor of the old Civil Service, who is quite as liberal a friend of judicial reform as any anti-Civilian lawyer can possibly be."

July, 1866.

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* See also Ante, page 129.

ERRATUM.

Page. Line.

132 14 for "*Patient*," read "*Patent*."

LIST OF ABBREVIATIONS.

| | |
|---------------|--|
| Arch. | Archbold's Criminal Law. |
| B. C. | Broom's Commentaries on the Common Law of England. |
| B. L. M. | Broom's Legal Maxims, 3rd Ed., 1858. |
| Booth L. T. | Booth's Landlords and Tenants. |
| Col. H. L. | Colebrook's Hindu Law. |
| Col. D. H. L. | Colebrook's Digest of Hindu Law. |
| C. L. | Circular Letters of Sudder Udalt. |
| C. O. | Circular Order of do. |
| C. R. | Civilian's Remembrancer. |
| Elber. | Elberling's Treatise on Inheritances, Gifts, &c. |
| H. C. R. | High Court Reports. |
| K. M. | Kindersley's Manual of the Law of Evidence. |
| Law. Stu. M. | Law Students' Manual. |
| L. P. S. | Lawrence's Principal and Surety. |
| Mag. P. H. L. | Magnaughten's Principles of Hindu Law. |
| Madras L. J. | Madras Law Journal. |
| Madras J. | Madras Jurist. |
| M. G. | Moonsiff's Guide, by Kristnaswamy Ayer. |
| M. P. C. | Mayne's Penal Code. |
| M. L. | Mahomedan Civil Law, by Sadagopah Charloo. |
| Nort. L. E. | Norton's Law of Evidence, 3rd Ed., 1862. |
| Nort. T. J. | Norton's Topic of Jurisprudence. |
| Rul. S. N. | Rulings of Sudder Udalt. |
| S. L. A. | Sutherland's Law of Adoption. |
| S. D. | Sudder Court Decisions. |
| S. M. | Sawyer's Manual of the Law of Contracts. |
| Sm. L. C. | Smith's Leading Cases, 5th Ed., 1862. |
| Stor. E. J. | Story's Equity Jurisprudence, 8th Ed., 1861. |
| Str. H. L. | Sir Strange's Hindu Law. |
| S. U. | Sudder Udalt. |
| V. D. | Vakeel's Digest, by Branson. |
| W. D. | Williams' Digest of Hindu Law. |
| W. L. | Whately's Logic. |
| W. R. | Whately's Rhetoric. |
| W. P. | Wilson on Partnership. |
| W. H. W. | Wilson on Husband and Wife. |
| W. M. S. | Wilson on Master and Servant. |

CHAPTER I.

THE DUTIES OF THE VAKEEL.

SECTION I.

Preliminary consideration before commencing a Suit.

BEFORE commencing a Suit Vakeels are to make preliminary enquiries on several points. They should consider—

1.) Whether a complete cause of action is vested in their client, for sometimes it will be found that the right of action was intended to accrue solely upon the happening of some event, which has not yet occurred.—*B. C.* 110.

2.) Whether or not the right of action has been postponed, as for instance where a credit was given for a specific period.—*Ib.* 112.

3.) Whether the right of action has been extinguished, as by *merger*.* For, where a judgment has been obtained for a debt as well as for a tort, the right given by the record *merges* the inferior remedy by action for the same debt or tort against another party.—*B. C.* 271.

4.) Whether the right of action has become barred by the statute of limitation. A Plaintiff, in order to avoid incurring useless expenses and disappointment, will be well advised on this point.—*Ib.* 112.

* The doctrine of merger is explained in these words. "If there be a breach of contract or wrong done, or any other cause of action, by one against another, and judgment be recovered in a Court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the Suit attained, so far as it can be at that stage. The cause of action is changed into a matter of record which is of a higher nature, and the inferior remedy is *merged* in the higher." These remarks equally apply where there is but one *cause of action*, whether it be against a single person or many. The judgment of a Court of record changes the nature of that cause of action, and prevents its being the subject of another suit and the cause of action being single cannot afterwards be divided into two.—*B. C.* 269—270.

5.) Whether or not any notice of action is requisite. Whenever the enforcement of a right of action is contemplated, some reasonable notice of the intended proceeding (even when not in strictness requisite) or some demand for pecuniary compensation or some request for the performance of that which has been wrongfully left undone, should be made upon the opposite party, in order that a fair opportunity for an amicable settlement may thus be afforded him. And hence it is that a respectable Vakeel will always make a demand of some sort on behalf of his client before commencing suit.—*Ib.* 113.

6.) What is the proper form of the action (*Ib.* 295). A party may not set up one title and then seek to recover upon another.—*K. S.* 19.

7.) By and against whom the action should be brought (*B. C.* 113) The Civil Procedure Act *VIII of 1859-Sec. XV* points out the selection of parties. The most general rule with respect to choosing the Plaintiffs, is, that, "He must be the Plaintiff in whom the legal interest is vested" (*B. C.* 131). A Mockti Vakeel cannot be a Plaintiff (*S. D. Page 80 of 1858 and 107 1859.*) nor can an agent lawfully nominate or appoint another to perform the subject matter of his agency, for the maxim is that "delegated authority cannot be redelegated."—*B. L. M.* 755.

The rule for selecting Defendants is—

In *ex contractu* : "He must be the Defendant by whom or whose behalf such contract was concluded."—*B. C.* 1.

In *ex delicto* : The party committing the wrongful act, asserting a right or title adverse to Plaintiffs—must be Defendant.—*B. C.* 168.

2 If the suit is to commence upon any contract or written deeds, the Vakeels have further to consider—

1.) Whether the contract or deed is inchoate merely, or incomplete (*B. C.* 628). A deed has no operation until delivery (*Ib.* 1). And this principle was also upheld by Sudder Udalt.—*R. P.* 2

2.) Whether there has been a reciprocity of assent and privity between the contracting parties. Suppose, A, is a debtor of B, creditor of C, in different sums; here B, cannot sue C, though upon the permission of A, because there is no reciprocity or privity between them, B, being merely stranger to the contract between A and C (*B. C.* 325).

3.) Whether there has been a consideration moving from one to the other. For “no action arises from a naked agreement (*N. §. 646*) or from a bare promise.”—*B. L. M. 669*.

4.) Whether the consideration was good and sufficient or was on any ground invalid.—*C. B. 528*.

5.) Whether the contract was illegal, as contravening the Statute Law or any public policy.—*Ib.*

6.) Whether it was founded on fraud, or was illusory.—*Ib.*

7.) Whether the legal capacity to contracting parties is unaffected.—*Ib. 629*.

8.) Whether, a right of action, in truth, exists and will be enforceable.—*Ib.*

9.) What will, probably in the event of success, be the amount of compensation, to be awarded by the court.—*Ib.*

10.) Is it, in short, worth while for the complainant (regard being had to all the facts submitted) to incur the anxiety of litigation, to risk the chance of defeat, with a penalty consequent thereupon, in the shape of costs, whilst in pursuit of a favorable verdict, and the damages which are to crown it? These are questions of much importance, although too little regarded by the practitioner.—*Ib.*

SECTION II.

Composition of Pleadings.

3. Vakeels are already in possession of the forms (*Sec XXVI Act VIII of 1859*.) in which pleadings are to be prepared. I can only add that in laying down any proposition or propositions, they should not enter on too wide a field of discussion, and introduce many propositions not sufficiently connected, an error which destroys the unity of composition. Unpractised composers are apt to fancy that they shall have the greater abundance of matter, the wider extent of subject they comprehend; but experience shows that the reverse is the fact: the more general and extensive view will often suggest nothing to the mind but vague and trite remarks; when upon narrowing the field of discussion, many interesting questions of detail present themselves.—*W. R. 24—25*.

4. The Vakeels must also ask themselves three questions 1st what is the fact; 2dly why (i. e. from what cause) is it so, or in other words, how is it accounted for; 3dly what consequences result from it.—*W. R.* 24—25.

5. The plaintiff must shew a state of facts which will, if unanswered, entitle him to judgment i. e. he should put forward his complaint expressed in language neither insensible nor ambiguous and in such a shape that he will, in point of law and in the absence of any good and sufficient defence, have a right to *some* redress. The plaint must conclude with a claim for damages which should be to an amount sufficient to cover the whole of the Plaintiff's demand.—*B. C.* 185.

6. When a written instrument is sued on, it may be set forth in the plaint according to its legal effect. Vakeels must take care that they neither plead that which is mere matter of evidence, nor that of which the court takes notice *ex officio*, nor that which would come more properly from the other side; nor should they allege circumstances which the law presumes or which are necessarily implied; nor affect an excessive particularity on the one hand, which is not essential to the case, nor allow, on the other hand, a statement to be made so vague and general in its terms as to give his adversary information which is not sufficiently specific.—*B. C.* 188.

7. A fault in the pleadings would occur when a *'departure'* is committed. This term is used when either party to the action, having taken up one ground of complaint in the declaration or of defence in the plea, at a subsequent stage of the pleading deserts it in favor of another ground inconsistent therewith. Again argumentativeness will not be sanctioned in the courts of law; for it is evidently essential with a view to the conclusive determination of disputes, that both parties should advance their positions of fact in an absolute form and not leave them to be collected by inference and argument only.—*Ib.*

8. When the rights of a party pleading depend upon the performance of conditions precedent; performance of such condition may be averred generally; and the opposite party shall not deny such averment generally but shall specify in his pleadings the condition or conditions precedent, the performance of which he intends to contest.—*Ib.* 190.

9. There are several different modes in which a Defendant may answer the Plaintiff's claim. He may set up a defence, either 1,

by way of demurrer to the declaration; or 2, by pleading in abatement, or, 3, by pleading in bar of the action; or, 4, he may both plead and demur to the declaration or, 5, he may pay money into court and plead such payment or, 6, he may set up certain equitable defence.—*Ib.* 191.

10. With respect to pleas which must be specially pleaded, it is directed that in any species of action on contract, as well as in tort, all matters in confession and avoidance including not only those by way of discharge but those which show the transaction to be either void or voidable in point of law on the ground of fraud, or otherwise, shall be specially pleaded. Thus, infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, endorsing, accepting &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation and various other defences must be specially pleaded.—*B. C.* 198.

11. The answer is to be drawn up in the same succinct manner as the Pleint and as rigidly confined to the immediate subject matter of the suit. Where however objections exist to the suit that the value in issue has been understated, that the Plaintiff is under personal disability to sue, that the suit has not been laid against the right parties, or against all who should have been included therein, that the subject matter thereof has already been adjudicated on, that the suit is barred by the statute of limitation, or that in any way it cannot be proceeded with, these exceptions should be briefly stated with the necessary particulars of sums, persons and dates, &c., and all such objections should be set forth prominently at the outset of the answer, that the suit in respect to them may be brought to a speedy issue. In proceeding to answer specifically to the Plaintiff's demand upon him, the Defendant is briefly to state the facts on his side opposed to the truth of the demand, with particulars of time, place, &c., but he is not to describe the evidence on which he rests for proof of his assertions nor to enter into any argument. For example where the suit may be for recovery on a bond the Defendant may simply deny that he ever borrowed the money from the Plaintiff or executed the bond; or he may plead that on such a day he discharged the bond; or that by such another transaction held with Plaintiff the debt has been cancelled in part or in whole. Or where the suit may be for land, if the Defendant dispute the title of the Plaintiff, he is to describe his own title with the same brevity enjoyed upon the Plaintiff in setting

forth his title in the Plaintiff; or if a mortgage be in question he may answer that the sum of the mortgage is higher than that named in the Plaintiff, or that he never had transaction with the Plaintiff respecting the land but as derived from such a one. And the same if the suit be brought on the ground of a lease, that the term of the lease has not elapsed, or that the circumstance to lead to forfeiture of the lease has not occurred, or that he holds the lease of another than Plaintiff. — *M. G.* 65—66.

12. Suits commonly have their origin in questions of law or of fact or both of law and fact. Pleadings are required to enable the Judge, upon a comparison of them, to perceive what questions he has to try, and to regulate the further conduct of the controversy, deciding at once, the questions of law, if there be no dispute as to facts, and where facts are disputed, directing how they are to be investigated. A Defendant denying the Plaintiff's claim must closely scrutinise the nature of the demand, and also the manner and form in which it has been brought forward, and must then proceed to frame his answer. The essence of the defence always is either that the alleged right has no existence at all, or that there is a higher right in the Defendant. The claim commonly amounts to an assertion, expressed or understood, of some general rule of law, an assertion that the case falls within that rule and a demand that the general rule may be applied to the particular case. The Defendant will naturally deny the existence of the alleged general rule of law, or the truth of the assertion that the Plaintiff's case falls within that rule, or will argue that the demand of the Plaintiff is not founded on a correct application of the rule to the particular case. The points at issue cannot be opened one after another in a series of pleadings. It is necessary that the main facts, upon which the parties respectively rely, should be set forth at large in the plaintiff and in the answer. Defences fall under three heads; 1st. That the case stated does not, of itself, entitle to the relief prayed for; 2nd. That, by reason of a fact not stated, the case stated does not entitle to the relief prayed for; 3rd. That the case stated is wholly or partially false. Under the first head, fall the objections apparent in the plaintiff, of limitation, valuation, or jurisdiction, as also the objections that the Plaintiff is under personal disability, or has no interest in the subject, or that the plaintiff is deficient in some essential points or that the suit is insufficient to answer the purpose of complete justice, because it does not include all proper parties, or because it is too limited or too comprehensive

tending to multiply litigation unreasonably, or confounding distinct subjects in the same suit. Under the second defence, all pleas connected with limitation, valuation, and jurisdiction not apparent from the plaint itself and pleas of previous decree, of suit pending, of an account settled, or of an award. Sometimes the Defendant denies that he has any right to the thing demanded by the complainant and disclaims or renounces all pretensions to it. He cannot, however, disclaim a liability, merely by alleging that he has no interest in the matter of the suit, for, others may have an interest in it against him, as where he is called upon for an account. Nor can a disclaimer by one Defendant be permitted to prejudice the Plaintiff's rights as against the others. When the Defendant comes to the 3rd class of the defence, his answer should state at large all the facts, as well as his conclusions. Matters within the personal knowledge of the Defendant must be truly stated by him. Alternative defences may be set up by him in matters of which he has no certain knowledge. But he cannot insist on two defences which are inconsistent with each other, or are the consequences of inconsistent facts. But he is at liberty to deny the Plaintiff's general title and also to insist that even if he establishes his title, he is precluded from obtaining what he demands, by some other circumstances. The Defendant's case perhaps, need not be so precisely stated as that of the Plaintiff, though it is prudent for him to state it pretty fully. The answer should meet the Plaintiff's statement at all points as fully as possible, since the adverse statement is likely to be presumed to be true, where the Defendant has not controverted it. Matters foreign to the suit or not affecting the Defendant need not be answered by him. If he is called upon to set forth a deed or other instrument, he should give the very words of the document. If he denies a fact, he should deny it directly and in point blank, but not in the form which is called negative pregnant. The answer, like all other pleadings, must be free from scandal and impertinence.—*M. G.* 67 to 69

13. In framing appeals the bonâ fide transaction and honesty of purpose of a Judge cannot be questioned, but his decision may be impugned for error either of Law or of fact.—*B. L. M.* 82.

14. No pleadings will be entertained which is couched in language disrespectful to the Court, or to the Judge of any other Court, or to any other public officer, or which contains terms of reproach against the other party.—*Practice of Sudder Udalut* p. 40.

15. Some Vakeels are in the habit of overwhelming the plead-

ings with *unreconcilable* precedents. This must be avoided. They should remember that courts are not hampered by precedents, but that they are directed to decide according to equity and good conscience.—*N. preface page 4.*

SECTION III.

Arrangement of Composition.

16. Arrangement is a more important point than is generally supposed; indeed it is not perhaps of less consequences in composition than in the Military art, in which it is well-known that with an equality of forces in numbers, courage, and every other point, the manner in which they are drawn up, so as either to afford mutual support, or on the other hand, even to impede and annoy each other, may make the difference of victory or defeat.—*W. R. 89.*

17. The usual and natural way of speaking or writing is to begin by declaring your opinion, and then to subjoin the reasons for it. But when the conclusion to be established is one likely to hurt the feelings and offend the prejudices of the hearers, it is essential to keep out of sight, as much as possible, the point to which we are tending, till the principles from which it is to be deduced shall have been clearly established; because men listen with prejudice, if at all, to arguments that are avowedly leading to a conclusion which they are indisposed to admit; whereas if we thus, as it were, mask the battery, they will not be able to shelter themselves from the discharge. The observance accordingly, or neglect of this rule, will often make the difference of success or failure.—*W. R. 91.*

18. A Proposition that is *Well-known*, (whether easy to be established or not,) and which contains nothing particularly offensive, should, in general, be stated at once, and the proofs subjoined; but one not familiar to the hearers, especially if it be likely to be unacceptable, should not be stated at the outset. It is usually better in that case to state the argument first, or at least some of them, and then introduce the Conclusion: thus assuming in some degree the character of an investigator.—*Ib.*

19. It may be observed, that if the Proposition to be maintained be such as the hearers are likely to regard as *insignificant*, the question should be at first suppressed; but if there be any thing

offensive to their prejudices, the *question* may be stated, but the *decision* of it, for a time, kept back.—*Ib.* 92.

20. You should never begin with a weakest point, but adopt Nestor's Plan of drawing up troops placing the best first and last, and the weakest in the middle.—*Ib.* 108.

SECTION IV.

Examination of Witnesses.

21. If you have any objection to make to the examination of witnesses the proper time for taking it (if it were known to you) is before the witnesses are sworn; but at any time during the examination at which the incompetency of the witness becomes apparent, the objection will prevail and the evidence already taken will be struck out.—*N.* § 365.

22. You may examine a witness as to all facts within his knowledge, as well as to inferences drawn by him from facts within his own knowledge; for instance as to his belief in the identity of hand-writing, which is framed upon his previous knowledge of the character of the writer's hand: but he cannot be asked as to his inferences drawn from what he has simply heard from others. For instance he could not be asked if he believed the Prisoner at the Bar, was the man whom he had heard described by others, or had seen described by the hue and cry, or any other advertisement.—*N.* § 382.

23. There is an exception however to this last rule in regard to belief or *opinion in matters of science*, where the maxim of the law is, "Credit is to be given to a witness skilled in his own profession." For instance, it is allowable for a medical man, who has not himself attended the prisoner as a patient, to sit in court during the trial, and having heard the facts of the prisoner's demeanour, conduct, &c. deposed to by other Witnesses, he may be asked what opinion, inference, or belief he draws from such evidence, assuming it to be true, as to the state of the prisoner's mind (*N.* § 383). So post office officials have been called to give their opinion the genuineness of post mark, or of a frank; Engineers upon buildings, painters upon pictures; seal-engravers as to the impression of a seal; nautical men on the navigation of a ship, &c. &c. *K.* § 313.

24. A witness skilled in foreign law may be asked as to his opinion of the law; (*N.* § 389); and mercantile usage of foreign country may be proved by a merchant who has carried on business in that country.

25. Great caution is necessary in receiving the evidence of professional witnesses (*Ib.* 390.) and a witness who falsely testifies to his belief is as liable to punishment for perjury as if he had falsely testified to facts.—*K.* § 323.

26. When a Witness is asked as to facts of which he has no recollection or but a faint one, except through the medium of some written Memorandum made at or about the time of the event to which it relates, he may look at such Memorandum for the purpose of refreshing his memory.—*N.* § 392.

27. When a document is so put into the hands of a witness for the above purpose the opposite pleader has a right to see it, and he may cross-examine the witness upon the whole of it.—*Ib.* § 397.

28. Leading questions are not to be asked. The ordinary criterion of a leading question is said to be, whether the answer to it would be directly "Yes" or "No." But this is scarcely accurate, as there are many questions which obviously could receive no other answer but which nevertheless could not be objected to on that ground (*N.* § 372). It is proper to lead a witness in all matters which are merely introductory, and the same question may be objectionable or unobjectionable according to the circumstance.—*Ib.* § 373.

29. Any question which suggests or prompts a particular answer is clearly inadmissible, and is more objectionable than a question directly leading in point of form. "I may caution the practitioner" says Mr. Norton, "against an indulgence in this foolish practice, for it weakens terribly the effect of the evidence so elicited, and is calculated to create the most unfavorable impression on the mind of the Judge."—*Ib.* 376.

SECTION V.

Cross-Examination.

30. The test of cross-examination is a most powerful weapon in the hand of Vakeels. But it is also a very dangerous, although a very tempting one, in the hands of a novice. It is a double edged weapon, and often wounds the wilder. (*Ib.* § 60). It is in this

branch of forensic practice that the youthful Vakeel is most eager for display. The old and wary pleader remembers that the Witness is hostile to him, and is perhaps on the watch to inflict damage on his cause. Every question is likely to give such a Witness an opportunity of clinching the nail he has driven before, if not of starting new matter, which the examination in chief may not have elicited but which may be further pursued on re-examination. Therefore unless there is some very good ground for believing that the Witness can be broken down, or convicted of falsehood, it is rarely good policy to submit him to a severe cross-examination. Sometimes a cross-Examination is little more than affectation, in order that the pleader may not seem to let the Witness go without question, as if he were totally impregnable: and a few questions are asked to shake his credit, or show the weakness of his memory. Sometimes too, a cross-examination may have the fishing object of eliciting some haphazard reply, and will open up matter favorable to the Examiner on further pursuit. But generally speaking, cross-examination is to be warily approached, and the way carefully felt.—*N.* § 418.

31. A skilful cross-examiner will often elicit from a reluctant witness most important truths, which the witness is desirous of concealing or disguising. There is another kind of skill, which consists in so alarming, misleading or bewildering an honest witness as to throw discredit on his testimony or pervert the effect of it. But generally speaking a quiet, gentle, and straightforward, though full, and careful, examination, will be the most adapted to elicit truth; and the manoeuvres and the brow-beating which are the most adapted to confuse an honest witness, are just what the dishonest one is the best prepared for. The more the storm blusters, the more carefully he wraps round him the cloak, which a warm sunshine will often induce him to throw off.—*W. R.* 42.

32. By the means of cross-examination the situation of the witness with respect to the parties and the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his power of discerning facts in the first instance, and his capacity for retaining and describing them, are fully investigated and ascertained and submitted to the consideration of the Judge who has an opportunity of observing the manner and demeanour of the Witness.—*N.* § 61.

33. Leading questions may be asked on cross-examination ; but words must not be put into the mouth of a witness, in order that he may echo them back ; nor must the Pleader by his form of questions, assume, as already proved, any fact which has not been proved, or any statement as made, which has not been made. This is an error of constant occurrence, though nothing can be more unfair.—*N.* § 400.

34. A witness may not be cross-examined as to collateral matters ; for they are foreign to the issue.—*Ib.* § 401.

35. But the character of a witness is never irrelevant, since it is of the highest importance in enabling the Judge to weigh the value of his testimony.—*Ib.* § 403.

36. By sections XXXII and XXXIII Act II of 1855 *criminating* and *degrading* questions may be put to a Witness. The difference between criminating and degrading questions is this. The former are those which threaten to bring the Witness subsequently within the danger of the Law ; the latter may be such as seek to expose his having already suffered the penalty of the Law (*Ib.* § 406 *Note M*). A Witness is bound to answer criminating questions, but when such questions are answered in the negative, it is not open to contradiction (*Ib.* 405). If a Witness is questioned as to whether he has been convicted of any felony or misdemeanour, and if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction.—*Ib.* § 68.

37. A witness may not foist into his answer on cross-examination, or indeed on any examination, statements not in answer to, nor explanatory of his answers to questions put to him. This is denominated volunteering evidence, and Pleader of the opposite party should be on his guard to check its introduction by objection.—*Ib.* § 417.

38. False testimony is of two kinds ; either it is false in toto ; or a portion of the evidence is true, but a false colouring is given by the deponent to the whole or a part of the testimony. Of these two the latter is by far the most common, and at the same time by far the most difficult to scope with and expose.—*Ib.* § 419.

39. When a witness relates in his examination in chief, evidence which is false in toto, the cross-examination should be directed to show the physical impossibility of what he has related in his examination in chief.—*Ib.* § 420.

40. When the falsehood is of the latter kind, the Pleader should endeavour by his cross-examination to establish the improbability or moral impossibility of the facts deposed to.—*N.* § 421.

41. When there is no reason to suspect the witness of falsehood, cross-examination should be directed to test his memory, observation, and the like.—*Ib.* § 426.

42. The manner or demeanour of a witness is ever to be closely watched and represented to the Judge during the oral pleadings. This scrutiny affords the Vakeels of Courts of original jurisdiction a vast superiority over those of appeal Court.—*Ib.* § 785.

43. A witness may display reluctance, evasion, affectation of dulness, exaggeration, over-willingness. An over-forward and hasty zeal on the part of the witness in giving testimony which will benefit the party whose witness he is, his exaggeration of circumstances, his reluctance in giving adverse evidence, his slowness in answering, his evasive replies, his affectation of not hearing, or not understanding the question, for the purpose of gaining time to consider the effect of his answer, precipitancy in answering without waiting to hear or to understand the nature of the question; his inability to detail any circumstances wherein, if his testimony were untrue, he would be open to contradiction, or his forwardness in minutely detailing those where he knows contradiction to be impossible; an affectation of indifference; are all to a greater or less extent obvious marks of sincerity.—*Ib.* § 786.

44. On the other hand, his promptness and frankness in answering questions without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction if his testimony be false, are, as well as numerous others of a similar nature, strong internal indications of his sincerity. The means thus afforded by a *viva voce* examination of judging of the credit due to Witness, especially where their statements conflict, are of incalculable advantage in the investigations of truth; they not unfrequently supply the only true test by which the real characters of the witness can be appreciated.—*N.* § 786.

SECTION VI.

Re-Examination.

45. Re-examination must be confined to the explanation of answers elicited on cross-examination; no new matter must be started.—*Ib.* § 429.

46. Where upon re-examination, it is desired to introduce new matter, the question should either be put by the Court or by the Pleader after leave first obtained from the Court. The opposite side will, of course, be entitled to cross-examine as to this new matter. The Court sometimes puts questions to a witness after the Pleaders have done with him; and there can be no cross-examination insisted on as to this matter, though the Court will usually put any question which may be suggested. The Court can always recall a witness who has been already examined, and may permit a pleader to do the same, if it is deemed necessary to supply some evident slip, or to elicit the truth on a new point.—*Ib.* 430.

SECTION VII.

Oral Pleadings.

47. The Vakeels should not commence their arguments and refutation at the same time and thus make confusion, as I have seen during the hearing of many a cause in which I was employed as Jevabnavis and interpreter.

48. The Vakeels' comments and arguments are the important assistance to their clients (*N.* § 597.) which by the abolition of several written pleadings formerly existed, have been made most powerful. If their comments are confused, they will derive no advantage but materially injure their cause.

49. Moreover misrepresentation of arguments—attempt to suppress evidence or to silence a speaker by clamour—abuse and personality—false charges, are irregularities which excite unfavourable impression of the case.—*W. R.* 44. There is also an old saying “He that has the worst cause makes the most noise.”

50. Commendation will ensue, and the clients' interests be best secured when causes are well handled and fairly pleaded.—*B. E.* 120.

51. Some Vakeels entertain a foolish idea that those who first speak will be able to prepossess the mind of the Judge and thus

gain the victory. But so far from jumping to a conclusion upon a one-sided argument, Judges are always upon their guard against drawing any conclusion from the interested assertions of a pleader. They always remember the consequences which result from hasty presumption. Vakeels should therefore regulate the oral pleadings in a fair and formal manner.

52. The right to begin devolves most commonly upon the Plaintiff, in virtue of the Rule that "he on whom the burden of making out the affirmation of the issue lies—in other words, the party against whom, if no evidence were offered on either side, the verdict would pass—is entitled to begin."—*B. C.* 221.

53. The Plaintiffs' or Appellants' Vakeel shall first commence the argument, and comment upon the evidence adduced in its support which is then to be summed up; the Vakeel for the opposite side noting down in the meanwhile any material facts that may drop from the mouth of his antagonist, and to which he may think his refutation necessary.

54. All observations which a Pleader may desire to make, are to be addressed to the Court, and never to the pleader on the other side.—*Rules of Practice* p. 38.

55. A party who has retained a Pleader to appear for him will not be heard in person, unless he first withdraw the Vakulutnamah.—*Ib.*

56. The speaker must confine himself to the subject matter of the Case before the Court; (*Rules of Practice of S. U. Sec. XIX.*) and before advancing any argument he should first consider—

1) Whether the principal object of his argument is such as to give *satisfaction to a candid mind* and to convey *instruction* to those who are ready to receive it, or to compel the assent or silence the objections of an opponent.—*W. R.* 70.

2) Whether, supposing the proposition in question to be admitted, would this statement here used as an argument serve to *account for*, and to explain, the truth or not.—*Ib.* 30.

57. He should not assume that which would come more properly from the other side. But briefly open *his* case and conduct the reading of the pleadings and documents and shall comment and argue in support of *his* case only.—*R. of Prac. S. U. Sec. XIX.*

58. His second speech is deferred until the evidence of the Defendant is laid before the Court and summed up by the opposite Pleader. Where evidence is offered for the Defendant, the party beginning, has the general reply; that is the opportunity afforded him of commenting on the whole case as well on his own evidence as on that of his opponent.—*B. C.* 222.

OF INTRODUCTION.

59. The Speaker should not alarm his audience in the outset, by announcing a great number of topics to be handled, because they and perhaps also several preliminary considerations, preparatory explanations &c. will be likely to listen with impatience to what they expect will prove tedious, and to feel an anticipated weariness even from the very commencement.—*W. R.* p. 109.

Introduction should not be composed *first*, but the speaker should consider first the main argument, for otherwise, seldom any thing will suggest itself but vague generalities; "*common*" topics, *i. e.* what would equally well suit several different compositions; whereas an Introduction that is composed last, will naturally spring out of the main subject, and appear appropriate to it.—*Ib.*

60. *Introduction inquisitive.*—In an Introduction, it may be useful to show that the subject in question is *important*, *curious*, or otherwise *interesting*, and worthy of attention. This may be called an "*Introduction inquisitive.*"

Introduction paradoxical *When the point to be proved or explained is one which may be very fully established, or on which there is little or no doubt, but may nevertheless be *strange*, and different from what might have been expected; it will often have a good effect in rousing the attention, to set forth as strongly as possible this *paradoxical* character, and dwell on the seeming improbability of that which must, after all, be admitted.—*Ib.* p. 110.

61. *Introduction corrective.*—"Introduction corrective," is to show that the subject has been *neglected*, *misunderstood*, or *misrepresented* by others. This will, in many cases, remove a most formidable obstacle in the hearer's mind, the anticipation of *triteness*, if the subject be,—or may be supposed to be,—a hacknied

* Paradox is a tenet or proposition contrary to received opinion, or seemingly absurd yet true in fact. See Webster's Dictionary.

one: and it may also serve to remove or loosen such prejudices as might be adverse to the favourable reception of our Arguments.—*Ib.*

62. *Introduction preparatory.*—It will often happen also, that there may be need to explain some *peculiarity* in the mode of reasoning to be adopted; to guard against some possible *mistake* as to the object proposed; or to apologize for some *deficiency*.—*Ib.*

Introduction narrative.—"Narrative Introduction," is to put the reader or hearer in possession of the outline of some transaction, or the description of some state of things, to which references and allusions are to be made in the course of the Composition.—*W. R. p. 111.*

OF CONCLUSION.

63. Concerning the "Conclusion" the general rules are, that it should be neither so sudden and abrupt as to induce the hearer to say, "I did not know he was going to *leave off*," nor again so long as to excite impatience.—*Ib.*

64. It should be carefully recollected by one who is delivering orally a written discourse, that though to *him* it is written, it is not so to his hearers; and he is consequently in danger of overlooking a fault in the Conclusion, while *they* will be struck by it. Notice should be given, a little, and but a little, beforehand, of the approach to a close; by saying "I will conclude by remarking," &c. or the like. The most frequent, and the most appropriate kind of Conclusion is a Recapitulation, either of the whole, or of part of the arguments that have been adduced.—*Ib. p. 112.*

65. It is a common fault of an extemporary speaker, to be tempted, by finding himself listened to with attention and approbation, to go on adding another and another sentence (what is called, in the homely language of the jest, "more last words") after he had intended, and announced his intention, to bring his discourse to a close; till at length the audience becoming manifestly weary and impatient, he is forced to conclude in a feeble and spiritless manner, like a half-extinguished candle going out in smoke. Let the Speaker decide beforehand what shall be his *concluding* topic; and let him premeditate thoroughly, not only the substance of it, but the mode of treating it, and all but the very words: and let him resolve that whatever liberty he may reserve to himself of expanding or contracting other parts of his speech, according as he finds the hearers more or less interested,

(which is, for an extemporary speaker, natural and proper,) he will strictly adhere to his original design in respect of what he was fixed on for his Conclusion; and that whenever he shall see fit to arrive at *that*, nothing shall tempt him either to expand it beyond what he had determined on, or to add any thing else beyond it.—*Ib.*

SECTION VIII.

Refutation.

66. On the conclusion of the Plaintiffs' or Appellants' pleading, the Pleader for Defendant or Respondent shall reply to the comments and arguments advanced on behalf of the Plaintiffs or Appellants, and briefly state his clients' case, and suggest and conduct the reading of the documentary paper on which he relies and shall comment and argue on his case (*Rules of Practice of S. U. Sec. XIX*). During this course, the Vakeel for the opposite party should not intervene.

67. Refutation of objections should generally be placed in the midst of the argument; but nearer the beginning than the end.—*W. R. 94.*

68. There are two ways in which a proposition may be refuted; 1st by proving the contradictory of it; 2ndly by overthrowing the argument by which it has been supported.—*Ib. 95.*

69. When you may feel it difficult to give a satisfactory refutation of the opposite opinions, till you have gone through the arguments in support of your own, it will be better to take some brief notice of them early in your discourse, with a promise of afterwards considering them more fully and refuting them.—*Ib.*

70. A sophistical use is often made of this last rule, when the objections are such as cannot really be satisfactorily answered. The skilful sophist will often, by the promise of a triumphant refutation hereafter, gain attention to his own statement; which, if it be made plausible, will so draw off the hearer's attention from the objections, that a very inadequate fulfilment of that promise will pass unnoticed, and due weight will not be allowed to the objections.—*Ib.*

71. Pleadings will not be unreasonably checked in the freedom of language they may employ on behalf of their clients. (*Rules of Practice* of p. 38); and they may even say when necessity requires that "to allow every man an unbounded freedom of speech must always be advantageous to the state" (*Whately's Logic*, 124). But they should not prolong their comments for, it not only excites immediate disapprobation, but weakens in the hearers' minds the force of all that had gone before, and the Vakeels will as already pointed out, be forced to conclude in a feeble and spiritless manner, like a half extinguished candle going out in smoke.—*W. R.* 112.

72. The closing remark should be not a long one, and should be not the least important and the striking of the whole discourse and if it contain a compressed repetition of something that had been before dwelt on, this is all the better.—*W. R.* 112.

73. In Controversy, the Indirect method of refutation is often adopted by choice, as it affords an opportunity for holding up an opponent to scorn and ridicule, by deducing some very absurd conclusion from the principles he maintains, or according to the mode of arguing he employs.—*Ib.* p. 97.

74. *Proving too much*.—Either the *Premiss* of an opponent, or his *Conclusion*, may be disproved, either in the Direct, or in the Indirect method; i. e. either by proving the truth of the Contradictory, or by showing that an absurd conclusion may fairly be deduced from the proposition you are combating. When this latter mode of refutation is adopted with respect to the *Premiss*, the phrase by which this procedure is usually designated, is, that the "Argument proves too much;" i. e. that it proves, besides the conclusion drawn, another which is manifestly inadmissible.—*W. R.* p. 97.

75. *Sophistical Refutation*.—One may often meet with a sophistical refutation of objections, consisting in counter-objections urged against something else which is taken for granted to be, though it is not, the *only alternative*. It is thus that a man commonly replies to the censure passed on any vice he is addicted to, by representing some other vice as worse; e. g. if he is blamed for being a sot, he dilates on the greater enormity of being a thief; as if there were any need he should be either.—*Ib.* p. 101.

76. *Overestimate of the force of Refutation*.—The force of a Refu-

tation is often over-rated : an argument which is satisfactorily answered ought merely to go for *nothing* : it is possible that the conclusion drawn may nevertheless be true : yet men are apt to take for granted that the Conclusion itself is disproved, when the Arguments brought forward to establish it, have been satisfactorily refuted ; assuming, when perhaps there is no ground for the assumption, that these are *all* the arguments that could be urged. This may be considered as the fallacy of denying the Consequent of a Conditional Proposition, from the Antecedent having been denied. "If such and such an Argument be admitted, the Assertion in question is true ; but that Argument is inadmissible ; therefore the Assertion is not true." Hence the injury done to any cause by a weak advocate ; the cause itself appearing to the vulgar to be overthrown, when the Arguments brought forward are answered.—*Ib.* 102.

77. Hence the danger of ever advancing more than can be well maintained ; since the refutation of *that* will often quash the whole. A guilty person may often escape by having too much laid to his charge ; so he may also by having too much evidence against him, *i. e.* some that is not in itself satisfactory : thus a prisoner may sometimes obtain acquittal by showing that one of the witnesses against him is an infamous informer and spy ; though perhaps if that part of the evidence had been omitted, the rest would have been sufficient for conviction."—*Ib.*

78. When no charge can really be substantiated, and yet it is desired to produce some present effect on the unthinking, there may be room for the application of the proverb, "Slander stontly, and something will stick:" the vulgar are apt to conclude, that where a great deal is said, *something* must be true ; and many are fond of that lazy contrivance for saving the trouble of thinking,—“splitting the difference;” imagining that they shew a laudable caution in believing *only a part* of what is said. And thus a malignant Sophist may gain such a temporary advantage by the multiplicity of his attacks.—*W. R.* p. 103.

79. On the above principle that a weak argument is positively hurtful, is founded a most important maxim, that it is not only the fairest, but also the wisest plan, to state objections in their *full* force ; at least, wherever there does exist a satisfactory answer to them ; otherwise, those who hear them stated more strongly than by the uncandid advocate who had undertaken to repel

them, will naturally enough conclude that they are unanswerable.—*Ib.*

80. *Too earnest Refutation.*—It is important to observe, that too earnest and elaborate a refutation of arguments which are really insignificant, or which their opponent wishes to represent as such, will frequently have the effect of giving them importance. Whatever is slightly noticed, and afterwards passed by with contempt, many readers and hearers will very often conclude (sometimes for no other reason) to be really contemptible. But if they are assured of this again and again with great earnestness, they often begin to doubt it. They see the respondent plying artillery and musketry,—bringing up horse and foot to the charge; and conceive that what is so vehemently assailed must possess great strength. One of his refutations might perhaps have left them perfectly convinced: all of them together, leave them in doubt.—*Ib.* 104.

81. But it is not to Refutation alone that this principle will apply. In other cases also it may happen that it shall be possible, and dangerous to write *too forcibly*. Such a caution may remind some readers of the personage in the fairy tale, whose swiftness was so prodigious, that he was obliged to tie his legs, lest he should overrun, and thus miss, the hares he was pursuing. But on consideration it will be seen that the caution is not unreasonable. When indeed the point maintained is one which most persons admit or are disposed to admit, but which they are prone to *lose sight* of, or to underrate in respect of its importance, or not to dwell on with an attention sufficiently practical, that is just the occasion which calls on us to put forth all our efforts in setting it forth in the most forcible manner possible. Yet even here, it is often necessary to caution the hearers against imagining that a point is *difficult* to establish, because its *importance* leads to dwell very much on it.—*Ib.* p. 104.

82. It is very possible that our reasoning may be “dark with excess of light.” Of course it is not meant that a Refutation should ever appear (when that can be avoided) *insufficient*;—that a conclusion should be left *doubtful* which we are able to establish fully. But in combating deep-rooted prejudices, and maintaining unpopular and paradoxical truths, the point to be aimed at should be, to adduce what is sufficient, and *not much more* than is sufficient, to prove your conclusion. If (in such a case) you can but satisfy

ment that your opinion is decidedly more probable than the opposite, you will have carried your point more effectually, than if you go on, much beyond this, to demonstrate by a multitude of the most forcible arguments, the extreme absurdity of thinking differently, till you have affronted the self-esteem of some, and awakened the distrust of others. Labourers who are employed in *driving wedges* into a block of wood, are careful to use blows of no greater force than is just sufficient. If they strike *too hard*, the elasticity of the wood will *throw out the wedge*.—*W. R. p. 106.*

83. There is in some cases another danger also to be apprehended from the employment of a great number and variety of arguments; (whether for refutation, or otherwise;) namely, that some of them, though really unanswerable, may be drawn from topics of which the unlearned reader or hearer is not, by his own knowledge, a competent judge; and these a crafty opponent will immediately assail, keeping all the rest out of sight; knowing that he is thus transferring the contest to another field, in which the result is sure to be, practically, a drawn battle.—*Ib.*

84. It is generally the wisest course, therefore, not only to employ such arguments as are *directly* accessible to the persons addressed, but to *confine* one-self to these, lest the attention should be drawn off from them.—*Ib. p. 107.*

On the whole, the arguments which it requires the greatest nicety of art to refute effectually, (I mean, for one who has truth on his side,) are those which are so very weak and silly that it is difficult to make their absurdity more palpable than it is already; at least without a risk of committing the error formerly noticed. The task reminds one of the well-known difficult feat of cutting through a cushion with a sword. And what augments the perplexity, is, that such arguments are usually brought forward by those who, we feel sure, are not themselves convinced by them, but are ashamed to avow their real reasons. So that in such a case we know that the refutation of these pretexts will not go one step towards convincing those who urge them; any more than the justifications of the lamb in the fable against the wolf's charges.—*Ib.*

85. The last remark to be made under this head, is, as to the difference between simply *disproving* an error, and showing whence it *arose*. Merely to prove that a certain position is untenable, if this be done quite decisively, *ought* indeed to be sufficient to

induce every one to abandon it : but if we can also succeed (which is usually a more difficult task,) in tracing the erroneous opinion up to its *origin*,—in destroying not only the branches but the root of the error,—this will afford much more complete satisfaction, and will be likely to produce a more lasting effect.—*Ib.* p. 108.

86. The conclusion you wish to draw, you may state plainly, and avow your intention of producing reasons which shall effect a conviction of that conclusion : you may even entreat the hearers' steady attention to the point to be proved, and to the process of argument by which it is to be established.—*W. R.* p. 118.

87. A Pleader often finds it advisable to aim at establishing—in reference to the feelings entertained towards himself—what may be regarded as a distinct point from any of the above; namely, the sincerity of his own conviction. In any description of composition, except the Speech of an *Advocate*, a man's maintaining a certain conclusion, is a presumption that he is convinced of it himself. Unless there be some special reason for doubting his integrity and good-faith, he is supposed to mean what he says, and to use arguments that are at least satisfactory to himself. But it is not so with a Pleader ; who is understood to be advocating the cause of the client who happens to have engaged him, and to have been equally ready to take the opposite side. The fullest belief in his uprightness, goes no further, at the utmost, than to satisfy us that he would not plead a cause which he was conscious was grossly unjust, and that he would not resort to any unfair artifices. But to allege all that can fairly be urged on behalf of his client, even though, as a judge, he might be inclined to decide the other way, is regarded as his professional duty.—*Ib.* p. 140 & 141.

88. If however he can induce a Jury to believe not only in his own general integrity of character, but also in his sincere conviction of the justice of his client's cause, this will give great additional weight to his pleading, since he will thus be regarded as a sort of *witness* in the cause. And this accordingly is aimed at, and often with success, by practised Advocates. They employ the language, and assume the manner, of full belief, and strong feeling.—*Ib.*

89. The consideration of the character of the Speaker, and of his opponent, being of so much importance, both as a legitimate source of Persuasion, in many instances, and also as a topic of

Fallacies, it is evidently incumbent on the orator to be well-versed in this branch of the art, with a view both to the justifiable advancement of his own cause, and to the detection and exposure of unfair artifice in an opponent. It is neither possible, nor can it in justice, be expected, that this mode of persuasion should be totally renounced and exploded, great as are the abuses to which it is liable; but the Speaker is bound, in conscience, to abstain from those abuses himself; and, in prudence, to be on his guard against them in others.—*Ib.* p. 144.

90. The *place* for disparagement of an opponent is, for the first Speaker, near the close of his discourse, to weaken the force of what may be said in reply; and, for the opponent, near the opening, to lessen the influence of what has been already said.—*W. R.* p. 146.

91. Either a personal prejudice, or some other passion unfavourable to the Speaker's object, may already exist in the minds of the hearers, which it must be his business to allay. It is obvious that this will be the most effectually be done, not by endeavouring to produce a state of perfect calmness and apathy, but by exciting some contrary emotion.—*Ib.*

OF RIDICULE.

92. It is said that serious arguments of an opponent are to be met by ridicule, and his ridicule, by serious arguments (which is evidently one that might be extended, in principle, to other feelings besides the sense of the ludicrous). But it is only occasionally applicable in practice; and considerable tact is requisite for perceiving suitable occasions, and employing them judiciously. For, a failure does great injury to him who makes the attempt. If you very gravely deprecate some ridicule that has been thrown out, without succeeding in destroying its force, you *increase* its force; because a *contrast* between the solemn and ludicrous heightens the effect of the latter. And if, again, you attempt unsuccessfully to make a jest of what the persons addressed regard as strong arguments, and serious subjects, you raise indignation or contempt; and are also considered as having, confessedly, no serious and valid objections to offer.—*Ib.* p. 147.

93. Of course, regard must be had to the character of those you are addressing. If these are ignorant of the subject, superficial, and unthinking, they will readily join in ridicule of such

reasoning as the better-informed and more judicious would despise them for not appreciating. And again they may easily be brought to regard a valid argument which exposes to ridicule some sophistry, as nothing more than a joke.—*Ib.*

94. But when you wish to expose to ridicule something really deserving of it which has been advanced seriously, or to rescue from ridicule what has been unfairly made a jest of, it will usually be advisable to keep a little aloof, for a time from the very point in question, till you have brought men's minds, by the introduction of suitable topics, into the mood required,—the derisive, or the serious, as the case may be,—and then to bring them up to that point, prepared to view it quite differently from what they had done. And if this be skilfully managed, the effect will sometimes be very striking.—*Ib.*

95. Such a procedure, it should be added, is sometimes adopted unfairly; that is, men who are mortified at finding the absurdity of their conduct, their tenets, or their arguments exposed to contemptuous ridicule, will often persuade others, and even themselves, that this mortification is a feeling of pious indignation in behalf of a serious or sacred subject, against which they falsely represent the ridicule as having been directed. Great caution therefore is requisite in employing such a weapon as ridicule.—*W. R. p. 148.*

96. It will often happen that it will be easier to give a *new direction* to the unfavourable passion, than to subdue it; *e. g.* to turn the indignation, or the laughter, of the hearers against a different object. Indeed, whenever the case will admit of this, it will generally prove the more successful expedient; because it does not imply the accomplishment of so great a change in the minds of the hearers.—*Ib.*

97. *Repetition.*—The best general rule for avoiding the disadvantages both of conciseness and of prolixity is to employ *Repetition*: to repeat, that is, the same sentiment and argument in many different forms of expression; each in itself brief, but all, together, affording such an expansion of the sense to be conveyed, and so detaining the mind upon it, as the case may require.—*Ib. p. 169.*

98. Care must of course be taken that the repetition may not be too glaringly apparent; the variation must not consist in the mere use of other, synonymous, words; but what has been ex-

pressed in appropriate terms may be repeated in metaphorical ; the antecedent and consequent of an argument, or the parts of an antithesis may be transposed ; or several different points that have been enumerated, presented in a varied order.—&c. *Ib.*

99. Another end, which in speaking is sometimes proposed, is to *occupy time*. When an unfavorable decision is apprehended, and the protraction of the debate may afford time for fresh voters to be summoned, or may lead to an adjournment, which will afford scope for some other manœuvre ;—when there is a chance of so wearying out the attention of the hearers, that they will listen with languor and impatience to what shall be urged on the other side ;—when an advocate is called upon to plead a cause in the absence of those whose opinion it is of the utmost importance to influence, and wishes to reserve all his arguments till they arrive, but till then, must apparently proceed in his pleading ; in these and many similar cases, which it is needless to particularize, it is a valuable talent to be able to pour forth with infuency an unlimited quantity of well-sounding language which has little or no meaning, yet which shall not strike the hearers as unintelligible or nonsensical, though it convey to their minds no distinct idea.—*Ib.* p. 176.

OF FALLACIES.

100. By a Fallacy is commonly understood, “any unsound mode of arguing, which appears to demand our conviction, and to be decisive of the question in hand, when in fairness it is not.” Considering the ready detection and clear exposure of Fallacies to be both more extensively important, and also more difficult, than many are aware of.—*W. L.* p. 101.

101. In the practical detection of each individual Fallacy, much must depend on natural and acquired acuteness ; nor can any rules be given, the mere learning of which will enable us to *apply* them with mechanical certainty and readiness : but still we shall find that to take correct general views of the subject, and to be familiarized with scientific discussions of it, will tend, above all things, to *engender such a habit of mind*, as will best fit us for practice.—*Ib.*

102. *Logical Fallacies*.—In every Fallacy, the conclusion either does, or *does not follow from the Premises*. Where the Conclusion does not follow from the Premises, it is manifest that the fault is in the *Reasoning*, and in that alone ; these, therefore, are called

Logical Fallacies, as being properly, violations of those rules of Reasoning which it is the province of Logic to lay down.—*Ib.* p. 105.

103. *Material Fallacies.*—Where the Conclusion does follow from the Premises it may be called the Material, or Non-Logical Fallacies: of these there are two kinds; 1st, when the Premises are such as ought not to have been assumed; 2nd, when the conclusion is not the one required, but irrelevant; because your Argument is not the proof of the *contradictory* of your opponent's assertion, which it should be; but proves, instead of that, some other proposition resembling it. (*Ib.* p. 106). Thus, I am required, by the circumstances of the case, (no matter why) to prove a certain Conclusion; I prove, not that, but one which is likely to be mistaken for it;—in this lies the Fallacy.—*Ib.* p. 107.

104. *Begging the question* takes place when one of the Premises (whether true or false) is either plainly equivalent to the conclusion, or depends on that for its own reception. The most plausible form of this Fallacy is arguing in a circle; and the greater the circle the harder to detect.—*Ib.*

105. *Importance of detecting Fallacies.*—A Fallacy is to be dreaded merely as a weapon fashioned and wielded by a skilful sophist; or, if they allow that a man may with honest intentions slide into one unconsciously, in the heat of argument, still they seem to suppose that where there is no dispute, there is no cause to dread Fallacy; whereas there is much danger, even in what may be called *solitary reasoning*, of sliding unawares into some Fallacy, by which one may be so far deceived as even to *act upon* the conclusion thus obtained. By "solitary reasonings" is meant the case in which one is not seeking for arguments to prove a given question, but laboring to elicit from one's previous stock of knowledge some useful inference.—*Ib.* p. 109.

106. *Twofold danger from any false assumption.*—In refutation of Fallacies including any false assumption employed as a Premiss this consideration ought not to be overlooked; that an unsound Principle, which has been employed to establish some mischievously false Conclusion, does not at once become harmless, and too insignificant to be worth refuting, as soon as that conclusion is given up, and the false Principle is no longer employed for that particular use. It may equally well lead to some other no less mischievous result. A false premiss, according as

it is combined with this, or with that, true one, will lead to two different false conclusions.—*W. L. p. 111.*

107. *Difficulty of detecting Fallacies.*—While sound reasoning is ever the more readily admitted, the more clearly it is perceived to be such Fallacy, on the contrary, being rejected as soon as perceived, will, of course, be the more likely to obtain reception, the more it is obscured and disguised by obliquity and complexity of expression. It is thus that it is the most likely either to slip accidentally from the careless reasoner, or to be brought forward deliberately by the Sophist. Not that he ever wishes this obscurity and complexity to be perceived; on the contrary, it is for his purpose that the expression should *appear* as clear and simple as possible, while in reality it is the most tangled net he can contrive.—*Ib. p. 112.*

108. *Fallacies concealed by elliptical language.*—It is usual to express our reasoning *elliptically*, so that a Premiss (or even two or three entire steps in a course of argument) which may be readily supplied, as being perfectly obvious, shall be left to be understood, the Sophist in like manner suppresses what is *not* obvious, but is in reality the weakest part of the argument: and uses every other contrivance to withdraw our attention (his art closely resembling the juggler's) from the quarter where the fallacy lies. Hence the uncertainty before mentioned, to which class any individual fallacy is to be referred: and hence it is that the *difficulty* of detecting and exposing Fallacy, is so much greater than that of comprehending and developing a process of sound argument. It is like the detection and apprehension of a criminal in spite of all his arts of concealment and disguise; when this is *accomplished*, and he is *brought to trial* with all the evidence of his guilt produced, his conviction and punishment are easy; and this is precisely the case with those Fallacies which are given as examples in Logical treatises; they are in fact already detected, by being stated in a plain and regular form, and are, as it were, only brought up to *receive sentence*. Or again, fallacious reasoning may be compared to a perplexed and entangled mass of *accounts*, which it requires much sagacity and close attention to clear up, and display in a regular and intelligible form; though *when this is once accomplished*, the whole appears so perfectly *simple*, that the unthinking are apt to under-value the skill and pains which have been employed upon it.—*W. L. p. 112.*

109. *Fallacies concealed by lengthy discussion.*—Moreover, it should be remembered, that a very long discussion is one of the most effectual veils of Fallacy. Sophistry, like poison, is at once detected, and nauseated, when presented to us in a concentrated form ; but a Fallacy which when stated barely, in a few sentences, would not deceive a child, may deceive half the world, if *diluted* in a quarto volume. For, as in a calculation, one single figure incorrectly stated will enable us to arrive at any result whatever, though every other figure, and the whole of the operations, be correct, so, a single false assumption in any process of reasoning, though every other be *true*, will enable us to draw what conclusion we please ; and the *greater* the number of true assumptions, the more likely it is that the false one will pass unnoticed. But when you single out one step in the course of reasoning, and exhibit it as a Syllogism with one Premiss true and the other false, the sophistry is easily perceived.—*Ib.* p. 113.

110. Fallacies are very much kept out of sight, being seldom perceived even by those who employ them ; but of their practical importance there can be no doubt, since it is notorious that a weak argument is always in practice, *detrimental* ; and that there is no absurdity so gross which men will not readily admit, if it appears to lead to a conclusion of which they are already convinced. Even a candid and sensible writer is not unlikely to be, by this means, *misled*, when he is seeking for arguments to support a conclusion which he has long been fully convinced of himself ; *i. e.* he will often use such arguments as would never have *convinced* himself, and are not likely to convince others, but rather (by the operation of the converse Fallacy) to *confirm* in their dissent those who before disagreed with him.—*Ib.* p. 115.

111. It is best therefore to endeavour to put yourself in the place of an *opponent* to your own arguments, and consider whether you could not find some objection to them. The applause of *one's own party* is a very unsafe ground for judging of the real force of an argumentative work, and consequently of its real utility. To satisfy those who were doubting, and to convince those who were opposed, are much better tests ; but *these* persons are seldom very loud in their applause, or very forward in bearing their testimony.—*Ib.*

OF AMBIGUITY.

112. It is common for the two Premises to be placed very far apart, and discussed in different parts of the discourse ; by

which means the inattentive hearer overlooks any ambiguity that may exist in the Middle-term. Hence the advantage of Logical habits, in fixing our attention strongly and steadily on the *important* terms of an argument.—*W. L. p. 116.*

113. When we mean to charge any argument with the fault of “equivocal middle,” it is not enough to say that the Middle-term is a word or phrase which *admits* of more than one meaning ; (for there are few that do not) but we must show, that in order for each premiss to be admitted, the Term in question must be understood in one sense (pointing out *what* that sense is) in one of the premises, and in another sense, in the other.—*Ib.*

114. *Importance of minute distinctions.*—If any one speaks contemptuously of “over exactness” in fixing the precise sense in which some term is used,—of attending to minute and subtle distinctions, &c. we may reply that these *minute* distinctions are exactly those which call for careful attention ; since it is *only* through the neglect of *these* that Fallacies ever escape detection.—*Ib.*

115. For, a very *glaring* and palpable equivocation could never mislead any one. To argue that “feathers dispel darkness because they are light,” or that “this man is agreeable, because he is *riding*, and *riding* is agreeable,” is an equivocation which could never be employed but in jest. And yet however slight in any case may be the distinction between the two senses of a Middle-term in the two premises, the apparent-argument will be equally inconclusive ; though its fallaciousness will be more likely to escape notice.—*Ib.*

116. Even so, it is for want of attention to *minute* points, that houses are robbed, or set on fire. Burglars do not in general come and batter down the front-door : but climb in at some window whose fastenings have been neglected. And an incendiary, or a careless servant, does not kindle a tar-barrel in the middle of a room, but leaves a lighted turf, or a candle snuff, in the thatch, or in a heap of shavings.—*Ib.*

117. In many cases, it is a good maxim, “take care of little things, and great ones will take care of themselves.”—*Ib.*

There are innumerable instance of a non-correspondence in paronymous words, as between *art* and *artful*, *design* and *designing*, *faith* and *faithful*, &c. ; and the more slight the variation of meaning, the more likely is the Fallacy to be successful ; for when the words have become so widely removed in sense as “pity” and

"pitiful," every one would perceive such a Fallacy, nor could it be employed but in a jest.—*Ib.* p. 118.

118. This Fallacy cannot in practice be refuted, (except when you are addressing regular logicians,) by stating merely the impossibility of reducing such an argument to the strict logical form. You must find some way of pointing out the non-correspondence of the terms in question; *e. g.* with respect to the example above, it might be remarked, that we speak of *strong* or *faint* "presumption" but we use no such expression in conjunction with the verb "presume," because the word itself *implies strength*.—*W. L. p.* 118.

119. No fallacy is more common in controversy than the present; since in this way the Sophist will often be able to misinterpret the propositions which his opponent admits or maintains, and so employ them against him. Thus in the examples just given, it is natural to conceive one of the Sophist's Premises to have been borrowed from his opponent.—*Ib.*

120. *Fallacy of Interrogations*.—The Fallacy of asking several questions which appear to be but one; so that whatever one answer is given, being of course applicable to one only of the implied questions, may be interpreted as applied to the other: the refutation is, of course, to reply *separately* to each question, *i. e.* to detect the ambiguity.—*Ib.* p. 119.

121. Much confusion often arises from ambiguity of words when unperceived. It would puzzle any one, proceeding on mere conjecture, to make out how the word "premises" should have come to signify "a building." The remedy for ambiguity is a *Definition* of the Term which is suspected of being used in two senses.—*Ib.* p. 125—6.

122. *Definition when most needed*.—It is important to observe that the very circumstance which in any case makes a definition the more necessary, is apt to lead to the *omission* of it: for when any terms are employed that are not familiarly introduced into ordinary discourse. The learner is ready to enquire, and the writer to anticipate the enquiry, what is meant by this or that term?—*Ib.*

123. *Definitions how far to be exacted*.—But here it may be proper to remark, that for the avoiding of Fallacy, or of Verbal-controversy, it is only requisite that the term should be employed uniformly in the same sense, *as far as the existing question is con-*

cerned. Thus, two persons might, in discussing the question whether Augustus was a GREAT man, have some such difference in their acceptation of the epithet "great," as would be non-essential to that question; *e. g.* one of them might understand by it nothing more than eminent intellectual and moral *qualities*; while the other might conceive it to imply the performance of splendid *actions*: this abstract difference of meaning would not produce any disagreement in the existing question, because both those circumstances are united in the case of Augustus; but if one (and not the other) of the parties understood the epithet "great" to imply pure patriotism,—*GENEROUSITY* of character, &c., then there *would* be a disagreement as to the application of the Term, even between those who might think alike of Augustus' character, as wanting in those qualities. Definition, the specific for ambiguity is to be employed, and demanded, with a view to this principle; it is sufficient on each occasion to define a Term *as far as regards the question in hand.*—*W. L. p. 127.*

124. *Arguing in a circle.*—Arguing in a circle must necessarily be unfair; though it frequently is practised undesignedly. (*Ib. p. 132*). Of course the *narrower* the Circle, the less likely it is to escape the detection, either of the reasoner himself, (for men often deceive *themselves* in this way) or of his hearers. When there is a long circuit of many intervening propositions before you come back to the original Conclusion, it will often not be perceived that the arguments really do proceed in a "Circle:" just as when any one is advancing in a *straight line* (as we are accustomed to call it) along a plain on this Earth's surface, it escapes our notice that we are really moving along the *circumference of a Circle*, (since the earth is a globe) and that if we could go on without interruption in the same line, we should at length arrive at the very spot we set out from. But this we readily perceive, when we are walking round a small hill.—*Ib. p. 132—3.*

125. If the *form of expression* of each proposition be *varied* every time it recurs,—the sense of it remaining the same,—this will greatly aid the deception.—*Ib.*

126. Of course, the way to expose the Fallacy, is to reverse this procedure: to narrow the Circle, by cutting off the intermediate steps, and to exhibit the same proposition,—when it comes round the second time,—in the same words.—*Ib.*

127. *Obliquity of expression.*—Obliquity and disguise being of course most important to the success of the *petitio principii* as well

as of other Fallacies, the Sophist will in general either have recourse to the "Circle," or else not venture to *state* distinctly his assumption of the point in question, but will rather assert some other proposition which *implies* it ; thus keeping out of sight (as a dexterous thief does stolen goods) the point in question, at the very moment when he is taking it for granted.—*Ib.*

128. Great force is often added to the employment in a declamatory work, of the Fallacy by bitterly *reproaching* or *deriding* an opponent, as denying some sacred truth, or some evident axiom ; assuming, that is, that he denies the *true* premiss, and keeping out of sight the one on which the question really turns.—*Ib.* p. 137.

129. Various kinds of proposition are, according to the occasion, substituted for the one of which proof is required. Sometimes the Particular for the Universal ; sometimes a proposition with different Terms : and various are the contrivances employed to effect and to conceal this substitution, and to make the Conclusion which the Sophist has drawn, answer, practically, the same purpose as the one he ought to have established. It will very often happen that some *emotion* will be excited—some sentiment impressed on the mind—(by a dexterous employment of this Fallacy) such as shall bring men into the *disposition* requisite for your purpose, though they may not have assented to, or even stated distinctly in their own minds, the *proposition* which it was your business to establish. Thus if a Sophist has to defend one who has been guilty of some *serious* offence, which he wishes to extenuate, though he is unable distinctly to prove that it is not such, yet if he can succeed in *making the audience laugh* at some casual matter, he has gained practically the same point.—*W. L.* p. 140.

130. So also if any one has pointed out the extenuating circumstances in some particular case of offence, so as to show that it differs widely from the generality of the same class, the Sophist, if he find himself unable to disprove these circumstances, may do away the force of them, by simply *referring the action to that very class*, which no one can deny that it belongs to, and the very name of which will excite a feeling of disgust sufficient to counteract the extenuation ; e. g. let it be a case of peculation ; and that many *mitigating* circumstances have been brought forward which cannot be denied, the sophistical opponent will reply, " Well, but after all, the man is a *rogue*, and there is an end of it ;"

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* See also Ante, page 129.

ERRATUM.

Page. Line.

132 14 for "*Patient*," read "*Patent*."

LIST OF ABBREVIATIONS.

| | |
|---------------|--|
| Arch. | Archbold's Criminal Law. |
| B. C. | Broom's Commentaries on the Common Law of England. |
| B. L. M. | Broom's Legal Maxims, 3rd Ed., 1858. |
| Booth L. T. | Booth's Landlords and Tenants. |
| Col. H. L. | Colebrook's Hindu Law. |
| Col. D. H. L. | Colebrook's Digest of Hindu Law. |
| C. L. | Circular Letters of Sudder Udalt. |
| C. O. | Circular Order of do. |
| C. R. | Civilian's Remembrancer. |
| Elber. | Elberling's Treatise on Inheritances, Gifts, &c. |
| H. C. R. | High Court Reports. |
| K. M. | Kindersley's Manual of the Law of Evidence. |
| Law. Stu. M. | Law Students' Manual. |
| L. P. S. | Lawrence's Principal and Surety. |
| Mag. P. H. L. | Magnaughten's Principles of Hindu Law. |
| Madras L. J. | Madras Law Journal. |
| Madras J. | Madras Jurist. |
| M. G. | Moonsiff's Guide, by Kristnaswamy Ayer. |
| M. P. C. | Mayne's Penal Code. |
| M. L. | Mahomedan Civil Law, by Sadagopah Charloo. |
| Nort. L. E. | Norton's Law of Evidence, 3rd Ed., 1862. |
| Nort. T. J. | Norton's Topic of Jurisprudence. |
| Rul. S. N. | Rulings of Sudder Udalt. |
| S. L. A. | Sutherland's Law of Adoption. |
| S. D. | Sudder Court Decisions. |
| S. M. | Sawyer's Manual of the Law of Contracts. |
| Sm. L. C. | Smith's Leading Cases, 5th Ed., 1862. |
| Stor. E. J. | Story's Equity Jurisprudence, 8th Ed., 1861. |
| Str. H. L. | Sir Strange's Hindu Law. |
| S. U. | Sudder Udalt. |
| V. D. | Vakeel's Digest, by Branson. |
| W. D. | Williams' Digest of Hindu Law. |
| W. L. | Whately's Logic. |
| W. R. | Whately's Rhetoric. |
| W. P. | Wilson on Partnership. |
| W. H. W. | Wilson on Husband and Wife. |
| W. M. S. | Wilson on Master and Servant. |

CHAPTER I.

THE DUTIES OF THE VAKEEL.

SECTION I.

Preliminary consideration before commencing a Suit.

BEFORE commencing a Suit Vakeels are to make preliminary enquiries on several points. They should consider—

1.) Whether a complete cause of action is vested in their client, for sometimes it will be found that the right of action was intended to accrue solely upon the happening of some event, which has not yet occurred.—*B. C.* 110.

2.) Whether or not the right of action has been postponed, as for instance where a credit was given for a specific period.—*Ib.* 112.

3.) Whether the right of action has been extinguished, as by *merger*.* For, where a judgment has been obtained for a debt as well as for a tort, the right given by the record *merges* the inferior remedy by action for the same debt or tort against another party.—*B. C.* 271.

4.) Whether the right of action has become barred by the statute of limitation. A Plaintiff, in order to avoid incurring useless expenses and disappointment, will be well advised on this point.—*Ib.* 112.

* The doctrine of merger is explained in these words. "If there be a breach of contract or wrong done, or any other cause of action, by one against another, and judgment be recovered in a Court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the Suit attained, so far as it can be at that stage. The cause of action is changed into a matter of record which is of a higher nature, and the inferior remedy is *merged* in the higher." These remarks equally apply where there is but one *cause of action*, whether it be against a single person or many. The judgment of a Court of record changes the nature of that cause of action, and prevents its being the subject of another suit and the cause of action being single cannot afterwards be divided into two.—*B. C.* 269—270.

5.) Whether or not any notice of action is requisite. Whenever the enforcement of a right of action is contemplated, some reasonable notice of the intended proceeding (even when not in strictness requisite) or some demand for pecuniary compensation or some request for the performance of that which has been wrongfully left undone, should be made upon the opposite party, in order that a fair opportunity for an amicable settlement may thus be afforded him. And hence it is that a respectable Vakeel will always make a demand of some sort on behalf of his client before commencing suit.—*Ib.* 113.

6.) What is the proper form of the action (*Ib.* 295). A party may not set up one title and then seek to recover upon another.—*K. S.* 19.

7.) By and against whom the action should be brought (*B. C.* 113) The Civil Procedure Act *VIII of 1859-Sec. XV* points out the selection of parties. The most general rule with respect to choosing the Plaintiffs, is, that, "He must be the Plaintiff in whom the legal interest is vested" (*B. C.* 131). A Mockti Vakeel cannot be a Plaintiff (*S. D. Page 80 of 1858 and 107 1859.*) nor can an agent lawfully nominate or appoint another to perform the subject matter of his agency, for the maxim is that "delegated authority cannot be redelegated."—*B. L. M.* 755.

The rule for selecting Defendants is—

In *ex contractu* : "He must be the Defendant by whom or whose behalf such contract was concluded."—*B. C.* 1.

In *ex delicto* : The party committing the wrongful act, asserting a right or title adverse to Plaintiffs—must be the Defendant.—*B. C.* 168.

2 If the suit is to commence upon any contract or written deeds, the Vakeels have further to consider—

1.) Whether the contract or deed is inchoate merely, or incomplete (*B. C.* 628). A deed has no operation until delivery (*Ib.* 1). And this principle was also upheld by *Sudder Udaltut*.—*R. P.* 2

2.) Whether there has been a reciprocity of assent and privity between the contracting parties. Suppose, A, is a debtor of B, creditor of C, in different sums; here B, cannot sue C, though upon the permission of A, because there is no reciprocity or privity between them, B, being merely stranger to the contract between A and C (*B. C.* 325).

3.) Whether there has been a consideration moving from one to the other. For “no action arises from a naked agreement (*N. §. 646*) or from a bare promise.”—*B. L. M. 669*.

4.) Whether the consideration was good and sufficient or was on any ground invalid.—*C. B. 528*.

5.) Whether the contract was illegal, as contravening the Statute Law or any public policy.—*Ib.*

6.) Whether it was founded on fraud, or was illusory.—*Ib.*

7.) Whether the legal capacity to contracting parties is unaffected.—*Ib. 629*.

8.) Whether, a right of action, in truth, exists and will be enforceable.—*Ib.*

9.) What will, probably in the event of success, be the amount of compensation, to be awarded by the court.—*Ib.*

10.) Is it, in short, worth while for the complainant (regard being had to all the facts submitted) to incur the anxiety of litigation, to risk the chance of defeat, with a penalty consequent thereupon, in the shape of costs, whilst in pursuit of a favorable verdict, and the damages which are to crown it? These are questions of much importance, although too little regarded by the practitioner.—*Ib.*

SECTION II.

Composition of Pleadings.

3. Vakeels are already in possession of the forms (*Sec XXVI Act VIII of 1859*.) in which pleadings are to be prepared. I can only add that in laying down any proposition or propositions, they should not enter on too wide a field of discussion, and introduce many propositions not sufficiently connected, an error which destroys the unity of composition. Unpractised composers are apt to fancy that they shall have the greater abundance of matter, the wider extent of subject they comprehend; but experience shows that the reverse is the fact: the more general and extensive view will often suggest nothing to the mind but vague and trite remarks; when upon narrowing the field of discussion, many interesting questions of detail present themselves.—*W. R. 24—25*.

4. The Vakeels must also ask themselves three questions 1st what is the fact; 2dly why (i. e. from what cause) is it so, or in other words, how is it accounted for; 3dly what consequences result from it.—*W. R.* 24—25.

5. The plaintiff must shew a state of facts which will, if unanswered, entitle him to judgment i. e. he should put forward his complaint expressed in language neither insensible nor ambiguous and in such a shape that he will, in point of law and in the absence of any good and sufficient defence, have a right to *some* redress. The plaint must conclude with a claim for damages which should be to an amount sufficient to cover the whole of the Plaintiff's demand.—*B. C.* 185.

6. When a written instrument is sued on, it may be set forth in the plaint according to its legal effect. Vakeels must take care that they neither plead that which is mere matter of evidence, nor that of which the court takes notice *ex officio*, nor that which would come more properly from the other side; nor should they allege circumstances which the law presumes or which are necessarily implied; nor affect an excessive particularity on the one hand, which is not essential to the case, nor allow, on the other hand, a statement to be made so vague and general in its terms as to give his adversary information which is not sufficiently specific.—*B. C.* 188.

7. A fault in the pleadings would occur when a *'departure'* is committed. This term is used when either party to the action, having taken up one ground of complaint in the declaration or of defence in the plea, at a subsequent stage of the pleading deserts it in favor of another ground inconsistent therewith. Again argumentativeness will not be sanctioned in the courts of law; for it is evidently essential with a view to the conclusive determination of disputes, that both parties should advance their positions of fact in an absolute form and not leave them to be collected by inference and argument only.—*Ib.*

8. When the rights of a party pleading depend upon the performance of conditions precedent; performance of such condition may be averred generally; and the opposite party shall not deny such averment generally but shall specify in his pleadings the condition or conditions precedent, the performance of which he intends to contest.—*Ib.* 190.

9. There are several different modes in which a Defendant may answer the Plaintiff's claim. He may set up a defence, either 1,

by way of demurrer to the declaration; or 2, by pleading in abatement, or, 3, by pleading in bar of the action; or, 4, he may both plead and demur to the declaration or, 5, he may pay money into court and plead such payment or, 6, he may set up certain equitable defence.—*Ib.* 191.

10. With respect to pleas which must be specially pleaded, it is directed that in any species of action on contract, as well as in tort, all matters in confession and avoidance including not only those by way of discharge but those which show the transaction to be either void or voidable in point of law on the ground of fraud, or otherwise, shall be specially pleaded. Thus, infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, endorsing, accepting &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation and various other defences must be specially pleaded.—*B. C.* 198.

11. The answer is to be drawn up in the same succinct manner as the Pleint and as rigidly confined to the immediate subject matter of the suit. Where however objections exist to the suit that the value in issue has been understated, that the Plaintiff is under personal disability to sue, that the suit has not been laid against the right parties, or against all who should have been included therein, that the subject matter thereof has already been adjudicated on, that the suit is barred by the statute of limitation, or that in any way it cannot be proceeded with, these exceptions should be briefly stated with the necessary particulars of sums, persons and dates, &c., and all such objections should be set forth prominently at the outset of the answer, that the suit in respect to them may be brought to a speedy issue. In proceeding to answer specifically to the Plaintiff's demand upon him, the Defendant is briefly to state the facts on his side opposed to the truth of the demand, with particulars of time, place, &c., but he is not to describe the evidence on which he rests for proof of his assertions nor to enter into any argument. For example where the suit may be for recovery on a bond the Defendant may simply deny that he ever borrowed the money from the Plaintiff or executed the bond; or he may plead that on such a day he discharged the bond; or that by such another transaction held with Plaintiff the debt has been cancelled in part or in whole. Or where the suit may be for land, if the Defendant dispute the title of the Plaintiff, he is to describe his own title with the same brevity enjoyed upon the Plaintiff in setting

forth his title in the Plaintiff; or if a mortgage be in question he may answer that the sum of the mortgage is higher than that named in the Plaintiff, or that he never had transaction with the Plaintiff respecting the land but as derived from such a one. And the same if the suit be brought on the ground of a lease, that the term of the lease has not elapsed, or that the circumstance to lead to forfeiture of the lease has not occurred, or that he holds the lease of another than Plaintiff. — *M. G.* 65—66.

12. Suits commonly have their origin in questions of law or of fact or both of law and fact. Pleadings are required to enable the Judge, upon a comparison of them, to perceive what questions he has to try, and to regulate the further conduct of the controversy, deciding at once, the questions of law, if there be no dispute as to facts, and where facts are disputed, directing how they are to be investigated. A Defendant denying the Plaintiff's claim must closely scrutinise the nature of the demand, and also the manner and form in which it has been brought forward, and must then proceed to frame his answer. The essence of the defence always is either that the alleged right has no existence at all, or that there is a higher right in the Defendant. The claim commonly amounts to an assertion, expressed or understood, of some general rule of law, an assertion that the case falls within that rule and a demand that the general rule may be applied to the particular case. The Defendant will naturally deny the existence of the alleged general rule of law, or the truth of the assertion that the Plaintiff's case falls within that rule, or will argue that the demand of the Plaintiff is not founded on a correct application of the rule to the particular case. The points at issue cannot be opened one after another in a series of pleadings. It is necessary that the main facts, upon which the parties respectively rely, should be set forth at large in the plaintiff and in the answer. Defences fall under three heads; 1st. That the case stated does not, of itself, entitle to the relief prayed for; 2nd. That, by reason of a fact not stated, the case stated does not entitle to the relief prayed for; 3rd. That the case stated is wholly or partially false. Under the first head, fall the objections apparent in the plaintiff, of limitation, valuation, or jurisdiction, as also the objections that the Plaintiff is under personal disability, or has no interest in the subject, or that the plaintiff is deficient in some essential points or that the suit is insufficient to answer the purpose of complete justice, because it does not include all proper parties, or because it is too limited or too comprehensive

tending to multiply litigation unreasonably, or confounding distinct subjects in the same suit. Under the second defence, all pleas connected with limitation, valuation, and jurisdiction not apparent from the plaint itself and pleas of previous decree, of suit pending, of an account settled, or of an award. Sometimes the Defendant denies that he has any right to the thing demanded by the complainant and disclaims or renounces all pretensions to it. He cannot, however, disclaim a liability, merely by alleging that he has no interest in the matter of the suit, for, others may have an interest in it against him, as where he is called upon for an account. Nor can a disclaimer by one Defendant be permitted to prejudice the Plaintiff's rights as against the others. When the Defendant comes to the 3rd class of the defence, his answer should state at large all the facts, as well as his conclusions. Matters within the personal knowledge of the Defendant must be truly stated by him. Alternative defences may be set up by him in matters of which he has no certain knowledge. But he cannot insist on two defences which are inconsistent with each other, or are the consequences of inconsistent facts. But he is at liberty to deny the Plaintiff's general title and also to insist that even if he establishes his title, he is precluded from obtaining what he demands, by some other circumstances. The Defendant's case perhaps, need not be so precisely stated as that of the Plaintiff, though it is prudent for him to state it pretty fully. The answer should meet the Plaintiff's statement at all points as fully as possible, since the adverse statement is likely to be presumed to be true, where the Defendant has not controverted it. Matters foreign to the suit or not affecting the Defendant need not be answered by him. If he is called upon to set forth a deed or other instrument, he should give the very words of the document. If he denies a fact, he should deny it directly and in point blank, but not in the form which is called negative pregnant. The answer, like all other pleadings, must be free from scandal and impertinence.—*M. G.* 67 to 69

13. In framing appeals the bonâ fide transaction and honesty of purpose of a Judge cannot be questioned, but his decision may be impugned for error either of Law or of fact.—*B. L. M.* 82.

14. No pleadings will be entertained which is couched in language disrespectful to the Court, or to the Judge of any other Court, or to any other public officer, or which contains terms of reproach against the other party.—*Practice of Sudder Udalt p.* 40.

15. Some Vakeels are in the habit of overwhelming the plead-

ings with *unreconcilable* precedents. This must be avoided. They should remember that courts are not hampered by precedents, but that they are directed to decide according to equity and good conscience.—*N. preface page 4.*

SECTION III.

Arrangement of Composition.

16. Arrangement is a more important point than is generally supposed; indeed it is not perhaps of less consequences in composition than in the Military art, in which it is well-known that with an equality of forces in numbers, courage, and every other point, the manner in which they are drawn up, so as either to afford mutual support, or on the other hand, even to impede and annoy each other, may make the difference of victory or defeat.—*W. R. 89.*

17. The usual and natural way of speaking or writing is to begin by declaring your opinion, and then to subjoin the reasons for it. But when the conclusion to be established is one likely to hurt the feelings and offend the prejudices of the hearers, it is essential to keep out of sight, as much as possible, the point to which we are tending, till the principles from which it is to be deduced shall have been clearly established; because men listen with prejudice, if at all, to arguments that are avowedly leading to a conclusion which they are indisposed to admit; whereas if we thus, as it were, mask the battery, they will not be able to shelter themselves from the discharge. The observance accordingly, or neglect of this rule, will often make the difference of success or failure.—*W. R. 91.*

18. A Proposition that is *Well-known*, (whether easy to be established or not,) and which contains nothing particularly offensive, should, in general, be stated at once, and the proofs subjoined; but one not familiar to the hearers, especially if it be likely to be unacceptable, should not be stated at the outset. It is usually better in that case to state the argument first, or at least some of them, and then introduce the Conclusion: thus assuming in some degree the character of an investigator.—*Ib.*

19. It may be observed, that if the Proposition to be maintained be such as the hearers are likely to regard as *insignificant*, the question should be at first suppressed; but if there be any thing

offensive to their prejudices, the *question* may be stated, but the *decision* of it, for a time, kept back.—*Ib.* 92.

20. You should never begin with a weakest point, but adopt Nestor's Plan of drawing up troops placing the best first and last, and the weakest in the middle.—*Ib.* 108.

SECTION IV.

Examination of Witnesses.

21. If you have any objection to make to the examination of witnesses the proper time for taking it (if it were known to you) is before the witnesses are sworn; but at any time during the examination at which the incompetency of the witness becomes apparent, the objection will prevail and the evidence already taken will be struck out.—*N.* § 365.

22. You may examine a witness as to all facts within his knowledge, as well as to inferences drawn by him from facts within his own knowledge; for instance as to his belief in the identity of hand-writing, which is framed upon his previous knowledge of the character of the writer's hand: but he cannot be asked as to his inferences drawn from what he has simply heard from others. For instance he could not be asked if he believed the Prisoner at the Bar, was the man whom he had heard described by others, or had seen described by the hue and cry, or any other advertisement.—*N.* § 382.

23. There is an exception however to this last rule in regard to belief or *opinion in matters of science*, where the maxim of the law is, "Credit is to be given to a witness skilled in his own profession." For instance, it is allowable for a medical man, who has not himself attended the prisoner as a patient, to sit in court during the trial, and having heard the facts of the prisoner's demeanour, conduct, &c. deposed to by other Witnesses, he may be asked what opinion, inference, or belief he draws from such evidence, assuming it to be true, as to the state of the prisoner's mind (*N.* § 383). So post office officials have been called to give their opinion the genuineness of post mark, or of a frank; Engineers upon buildings, painters upon pictures; seal-engravers as to the impression of a seal; nautical men on the navigation of a ship, &c. &c. *K.* § 313.

24. A witness skilled in foreign law may be asked as to his opinion of the law; (*N.* § 389); and mercantile usage of foreign country may be proved by a merchant who has carried on business in that country.

25. Great caution is necessary in receiving the evidence of professional witnesses (*Ib.* 390.) and a witness who falsely testifies to his belief is as liable to punishment for perjury as if he had falsely testified to facts.—*K.* § 323.

26. When a Witness is asked as to facts of which he has no recollection or but a faint one, except through the medium of some written Memorandum made at or about the time of the event to which it relates, he may look at such Memorandum for the purpose of refreshing his memory.—*N.* § 392.

27. When a document is so put into the hands of a witness for the above purpose the opposite pleader has a right to see it, and he may cross-examine the witness upon the whole of it.—*Ib.* § 397.

28. Leading questions are not to be asked. The ordinary criterion of a leading question is said to be, whether the answer to it would be directly "Yes" or "No." But this is scarcely accurate, as there are many questions which obviously could receive no other answer but which nevertheless could not be objected to on that ground (*N.* § 372). It is proper to lead a witness in all matters which are merely introductory, and the same question may be objectionable or unobjectionable according to the circumstance.—*Ib.* § 373.

29. Any question which suggests or prompts a particular answer is clearly inadmissible, and is more objectionable than a question directly leading in point of form. "I may caution the practitioner" says Mr. Norton, "against an indulgence in this foolish practice, for it weakens terribly the effect of the evidence so elicited, and is calculated to create the most unfavorable impression on the mind of the Judge."—*Ib.* 376.

SECTION V.

Cross-Examination.

30. The test of cross-examination is a most powerful weapon in the hand of Vakeels. But it is also a very dangerous, although a very tempting one, in the hands of a novice. It is a double edged weapon, and often wounds the wilder. (*Ib.* § 60). It is in this

branch of forensic practice that the youthful Vakeel is most eager for display. The old and wary pleader remembers that the Witness is hostile to him, and is perhaps on the watch to inflict damage on his cause. Every question is likely to give such a Witness an opportunity of clinching the nail he has driven before, if not of starting new matter, which the examination in chief may not have elicited but which may be further pursued on re-examination. Therefore unless there is some very good ground for believing that the Witness can be broken down, or convicted of falsehood, it is rarely good policy to submit him to a severe cross-examination. Sometimes a cross-Examination is little more than affectation, in order that the pleader may not seem to let the Witness go without question, as if he were totally impregnable: and a few questions are asked to shake his credit, or show the weakness of his memory. Sometimes too, a cross-examination may have the fishing object of eliciting some haphazard reply, and will open up matter favorable to the Examiner on further pursuit. But generally speaking, cross-examination is to be warily approached, and the way carefully felt.—*N.* § 418.

31. A skilful cross-examiner will often elicit from a reluctant witness most important truths, which the witness is desirous of concealing or disguising. There is another kind of skill, which consists in so alarming, misleading or bewildering an honest witness as to throw discredit on his testimony or pervert the effect of it. But generally speaking a quiet, gentle, and straightforward, though full, and careful, examination, will be the most adapted to elicit truth; and the manoeuvres and the brow-beating which are the most adapted to confuse an honest witness, are just what the dishonest one is the best prepared for. The more the storm blusters, the more carefully he wraps round him the cloak, which a warm sunshine will often induce him to throw off.—*W. R.* 42.

32. By the means of cross-examination the situation of the witness with respect to the parties and the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his power of discerning facts in the first instance, and his capacity for retaining and describing them, are fully investigated and ascertained and submitted to the consideration of the Judge who has an opportunity of observing the manner and demeanour of the Witness.—*N.* § 61.

33. Leading questions may be asked on cross-examination ; but words must not be put into the mouth of a witness, in order that he may echo them back ; nor must the Pleader by his form of questions, assume, as already proved, any fact which has not been proved, or any statement as made, which has not been made. This is an error of constant occurrence, though nothing can be more unfair.—*N.* § 400.

34. A witness may not be cross-examined as to collateral matters ; for they are foreign to the issue.—*Ib.* § 401.

35. But the character of a witness is never irrelevant, since it is of the highest importance in enabling the Judge to weigh the value of his testimony.—*Ib.* § 403.

36. By sections XXXII and XXXIII Act II of 1855 *criminating* and *degrading* questions may be put to a Witness. The difference between criminating and degrading questions is this. The former are those which threaten to bring the Witness subsequently within the danger of the Law ; the latter may besuch as seek to expose his having already suffered the penalty of the Law (*Ib.* § 406 *Note M*). A Witness is bound to answer criminating questions, but when such questions are answered in the negative, it is not open to contradiction (*Ib.* 405). If a Witness is questioned as to whether he has been convicted of any felony or misdemeanour, and if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction.—*Ib.* § 68.

37. A witness may not foist into his answer on cross-examination, or indeed on any examination, statements not in answer to, nor explanatory of his answers to questions put to him. This is denominated volunteering evidence, and Pleader of the opposite party should be on his guard to check its introduction by objection.—*Ib.* § 417.

38. False testimony is of two kinds ; either it is false in toto ; or a portion of the evidence is true, but a false colouring is given by the deponent to the whole or a part of the testimony. Of these two the latter is by far the most common, and at the same time by far the most difficult to scope with and expose.—*Ib.* § 419.

39. When a witness relates in his examination in chief, evidence which is false in *toto*, the cross-examination should be directed to show the physical impossibility of what he has related in his examination in chief.—*Ib.* § 420.

40. When the falsehood is of the latter kind, the Pleader should endeavour by his cross-examination to establish the improbability or moral impossibility of the facts deposed to.—*N.* § 421.

41. When there is no reason to suspect the witness of falsehood, cross-examination should be directed to test his memory, observation, and the like.—*Ib.* § 426.

42. The manner or demeanour of a witness is ever to be closely watched and represented to the Judge during the oral pleadings. This scrutiny affords the Vakeels of Courts of original jurisdiction a vast superiority over those of appeal Court.—*Ib.* § 785.

43. A witness may display reluctance, evasion, affectation of dulness, exaggeration, over-willingness. An over-forward and hasty zeal on the part of the witness in giving testimony which will benefit the party whose witness he is, his exaggeration of circumstances, his reluctance in giving adverse evidence, his slowness in answering, his evasive replies, his affectation of not hearing, or not understanding the question, for the purpose of gaining time to consider the effect of his answer, precipitancy in answering without waiting to hear or to understand the nature of the question; his inability to detail any circumstances wherein, if his testimony were untrue, he would be open to contradiction, or his forwardness in minutely detailing those where he knows contradiction to be impossible; an affectation of indifference; are all to a greater or less extent obvious marks of sincerity.—*Ib.* § 786.

44. On the other hand, his promptness and frankness in answering questions without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction if his testimony be false, are, as well as numerous others of a similar nature, strong internal indications of his sincerity. The means thus afforded by a *viva voce* examination of judging of the credit due to Witness, especially where their statements conflict, are of incalculable advantage in the investigations of truth; they not unfrequently supply the only true test by which the real characters of the witness can be appreciated.—*N.* § 786.

SECTION VI.

Re-Examination.

45. Re-examination must be confined to the explanation of answers elicited on cross-examination; no new matter must be started.—*Ib.* § 429.

46. Where upon re-examination, it is desired to introduce new matter, the question should either be put by the Court or by the Pleader after leave first obtained from the Court. The opposite side will, of course, be entitled to cross-examine as to this new matter. The Court sometimes puts questions to a witness after the Pleaders have done with him; and there can be no cross-examination insisted on as to this matter, though the Court will usually put any question which may be suggested. The Court can always recall a witness who has been already examined, and may permit a pleader to do the same, if it is deemed necessary to supply some evident slip, or to elicit the truth on a new point.—*Ib.* 430.

SECTION VII.

Oral Pleadings.

47. The Vakeels should not commence their arguments and refutation at the same time and thus make confusion, as I have seen during the hearing of many a cause in which I was employed as Jevabnavis and interpreter.

48. The Vakeels' comments and arguments are the important assistance to their clients (*N.* § 597.) which by the abolition of several written pleadings formerly existed, have been made most powerful. If their comments are confused, they will derive no advantage but materially injure their cause.

49. Moreover misrepresentation of arguments—attempt to suppress evidence or to silence a speaker by clamour—abuse and personality—false charges, are irregularities which excite unfavourable impression of the case.—*W. R.* 44. There is also an old saying “He that has the worst cause makes the most noise.”

50. Commendation will ensue, and the clients' interests be best secured when causes are well handled and fairly pleaded.—*B. E.* 120.

51. Some Vakeels entertain a foolish idea that those who first speak will be able to prepossess the mind of the Judge and thus

gain the victory. But so far from jumping to a conclusion upon a one-sided argument, Judges are always upon their guard against drawing any conclusion from the interested assertions of a pleader. They always remember the consequences which result from hasty presumption. Vakeels should therefore regulate the oral pleadings in a fair and formal manner.

52. The right to begin devolves most commonly upon the Plaintiff, in virtue of the Rule that "he on whom the burden of making out the affirmation of the issue lies—in other words, the party against whom, if no evidence were offered on either side, the verdict would pass—is entitled to begin."—*B. C.* 221.

53. The Plaintiffs' or Appellants' Vakeel shall first commence the argument, and comment upon the evidence adduced in its support which is then to be summed up; the Vakeel for the opposite side noting down in the meanwhile any material facts that may drop from the mouth of his antagonist, and to which he may think his refutation necessary.

54. All observations which a Pleader may desire to make, are to be addressed to the Court, and never to the pleader on the other side.—*Rules of Practice* p. 38.

55. A party who has retained a Pleader to appear for him will not be heard in person, unless he first withdraw the Vakulutnamah.—*Ib.*

56. The speaker must confine himself to the subject matter of the Case before the Court; (*Rules of Practice of S. U. Sec. XIX.*) and before advancing any argument he should first consider—

1) Whether the principal object of his argument is such as to give *satisfaction to a candid mind* and to convey *instruction* to those who are ready to receive it, or to compel the assent or silence the objections of an opponent.—*W. R.* 70.

2) Whether, supposing the proposition in question to be admitted, would this statement here used as an argument serve to *account for*, and to explain, the truth or not.—*Ib.* 30.

57. He should not assume that which would come more properly from the other side. But briefly open *his* case and conduct the reading of the pleadings and documents and shall comment and argue in support of *his* case only.—*R. of Prac. S. U. Sec. XIX.*

58. His second speech is deferred until the evidence of the Defendant is laid before the Court and summed up by the opposite Pleader. Where evidence is offered for the Defendant, the party beginning, has the general reply; that is the opportunity afforded him of commenting on the whole case as well on his own evidence as on that of his opponent.—*B. C.* 222.

OF INTRODUCTION.

59. The Speaker should not alarm his audience in the outset, by announcing a great number of topics to be handled, because they and perhaps also several preliminary considerations, preparatory explanations &c. will be likely to listen with impatience to what they expect will prove tedious, and to feel an anticipated weariness even from the very commencement.—*W. R.* p. 109.

Introduction should not be composed *first*, but the speaker should consider first the main argument, for otherwise, seldom any thing will suggest itself but vague generalities; "*common*" topics, *i. e.* what would equally well suit several different compositions; whereas an Introduction that is composed last, will naturally spring out of the main subject, and appear appropriate to it.—*Ib.*

60. *Introduction inquisitive.*—In an Introduction, it may be useful to show that the subject in question is *important*, *curious*, or otherwise *interesting*, and worthy of attention. This may be called an "*Introduction inquisitive.*"

Introduction paradoxical *When the point to be proved or explained is one which may be very fully established, or on which there is little or no doubt, but may nevertheless be *strange*, and different from what might have been expected; it will often have a good effect in rousing the attention, to set forth as strongly as possible this *paradoxical* character, and dwell on the seeming improbability of that which must, after all, be admitted.—*Ib.* p. 110.

61. *Introduction corrective.*—"Introduction corrective," is to show that the subject has been *neglected*, *misunderstood*, or *misrepresented* by others. This will, in many cases, remove a most formidable obstacle in the hearer's mind, the anticipation of *triteness*, if the subject be,—or may be supposed to be,—a hacknied

* Paradox is a tenet or proposition contrary to received opinion, or seemingly absurd yet true in fact. See Webster's Dictionary.

one: and it may also serve to remove or loosen such prejudices as might be adverse to the favourable reception of our Arguments.—*Ib.*

62. *Introduction preparatory.*—It will often happen also, that there may be need to explain some *peculiarity* in the mode of reasoning to be adopted; to guard against some possible *mistake* as to the object proposed; or to apologize for some *deficiency*.—*Ib.*

Introduction narrative.—"Narrative Introduction," is to put the reader or hearer in possession of the outline of some transaction, or the description of some state of things, to which references and allusions are to be made in the course of the Composition.—*W. R. p. 111.*

OF CONCLUSION.

63. Concerning the "Conclusion" the general rules are, that it should be neither so sudden and abrupt as to induce the hearer to say, "I did not know he was going to *leave off*," nor again so long as to excite impatience.—*Ib.*

64. It should be carefully recollected by one who is delivering orally a written discourse, that though to *him* it is written, it is not so to his hearers; and he is consequently in danger of overlooking a fault in the Conclusion, while *they* will be struck by it. Notice should be given, a little, and but a little, beforehand, of the approach to a close; by saying "I will conclude by remarking," &c. or the like. The most frequent, and the most appropriate kind of Conclusion is a Recapitulation, either of the whole, or of part of the arguments that have been adduced.—*Ib. p. 112.*

65. It is a common fault of an extemporary speaker, to be tempted, by finding himself listened to with attention and approbation, to go on adding another and another sentence (what is called, in the homely language of the jest, "more last words") after he had intended, and announced his intention, to bring his discourse to a close; till at length the audience becoming manifestly weary and impatient, he is forced to conclude in a feeble and spiritless manner, like a half-extinguished candle going out in smoke. Let the Speaker decide beforehand what shall be his *concluding* topic; and let him premeditate thoroughly, not only the substance of it, but the mode of treating it, and all but the very words: and let him resolve that whatever liberty he may reserve to himself of expanding or contracting other parts of his speech, according as he finds the hearers more or less interested,

(which is, for an extemporary speaker, natural and proper,) he will strictly adhere to his original design in respect of what he was fixed on for his Conclusion; and that whenever he shall see fit to arrive at *that*, nothing shall tempt him either to expand it beyond what he had determined on, or to add any thing else beyond it.—*Ib.*

SECTION VIII.

Refutation.

66. On the conclusion of the Plaintiffs' or Appellants' pleading, the Pleader for Defendant or Respondent shall reply to the comments and arguments advanced on behalf of the Plaintiffs or Appellants, and briefly state his clients' case, and suggest and conduct the reading of the documentary paper on which he relies and shall comment and argue on his case (*Rules of Practice of S. U. Sec. XIX*). During this course, the Vakeel for the opposite party should not intervene.

67. Refutation of objections should generally be placed in the midst of the argument; but nearer the beginning than the end.—*W. R. 94.*

68. There are two ways in which a proposition may be refuted; 1st by proving the contradictory of it; 2ndly by overthrowing the argument by which it has been supported.—*Ib. 95.*

69. When you may feel it difficult to give a satisfactory refutation of the opposite opinions, till you have gone through the arguments in support of your own, it will be better to take some brief notice of them early in your discourse, with a promise of afterwards considering them more fully and refuting them.—*Ib.*

70. A sophistical use is often made of this last rule, when the objections are such as cannot really be satisfactorily answered. The skilful sophist will often, by the promise of a triumphant refutation hereafter, gain attention to his own statement; which, if it be made plausible, will so draw off the hearer's attention from the objections, that a very inadequate fulfilment of that promise will pass unnoticed, and due weight will not be allowed to the objections.—*Ib.*

71. Pleadings will not be unreasonably checked in the freedom of language they may employ on behalf of their clients. (*Rules of Practice of p. 38*); and they may even say when necessity requires that "to allow every man an unbounded freedom of speech must always be advantageous to the state" (*Whately's Logic. 124*). But they should not prolong their comments for, it not only excites immediate disapprobation, but weakens in the hearers' minds the force of all that had gone before, and the Vakeels will as already pointed out, be forced to conclude in a feeble and spiritless manner, like a half extinguished candle going out in smoke.—*W. R. 112.*

72. The closing remark should be not a long one, and should be not the least important and the striking of the whole discourse and if it contain a compressed repetition of something that had been before dwelt on, this is all the better.—*W. R. 112.*

73. In Controversy, the Indirect method of refutation is often adopted by choice, as it affords an opportunity for holding up an opponent to scorn and ridicule, by deducing some very absurd conclusion from the principles he maintains, or according to the mode of arguing he employs.—*Ib. p. 97.*

74. *Proving too much.*—Either the *Premiss* of an opponent, or his *Conclusion*, may be disproved, either in the Direct, or in the Indirect method; i. e. either by proving the truth of the Contradictory, or by showing that an absurd conclusion may fairly be deduced from the proposition you are combating. When this latter mode of refutation is adopted with respect to the *Premiss*, the phrase by which this procedure is usually designated, is, that the "Argument proves too much;" i. e. that it proves, besides the conclusion drawn, another which is manifestly inadmissible.—*W. R. p. 97.*

75. *Sophistical Refutation.*—One may often meet with a sophistical refutation of objections, consisting in counter-objections urged against something else which is taken for granted to be, though it is not, the *only alternative*. It is thus that a man commonly replies to the censure passed on any vice he is addicted to, by representing some other vice as worse; e. g. if he is blamed for being a sot, he dilates on the greater enormity of being a thief; as if there were any need he should be either.—*Ib. p. 101.*

76. *Overestimate of the force of Refutation.*—The force of a Refu-

tation is often over-rated : an argument which is satisfactorily answered ought merely to go for *nothing* : it is possible that the conclusion drawn may nevertheless be true : yet men are apt to take for granted that the Conclusion itself is disproved, when the Arguments brought forward to establish it, have been satisfactorily refuted ; assuming, when perhaps there is no ground for the assumption, that these are *all* the arguments that could be urged. This may be considered as the fallacy of denying the Consequent of a Conditional Proposition, from the Antecedent having been denied. "If such and such an Argument be admitted, the Assertion in question is true ; but that Argument is inadmissible ; *therefore the Assertion is not true.*" Hence the injury done to any cause by a weak advocate ; the cause itself appearing to the vulgar to be overthrown, when the Arguments brought forward are answered.—*Ib.* 102.

77. Hence the danger of ever advancing more than can be well maintained ; since the refutation of *that* will often quash the whole. A guilty person may often escape by having too much laid to his charge ; so he may also by having too much evidence against him, *i. e.* some that is not in itself satisfactory : thus a prisoner may sometimes obtain acquittal by showing that one of the witnesses against him is an infamous informer and spy ; though perhaps if that part of the evidence had been omitted, the rest would have been sufficient for conviction."—*Ib.*

78. When no charge can really be substantiated, and yet it is desired to produce some present effect on the unthinking, there may be room for the application of the proverb, "Slander stontly, and something will stick:" the vulgar are apt to conclude, that where a great deal is said, *something* must be true ; and many are fond of that lazy contrivance for saving the trouble of thinking,—“splitting the difference;” imagining that they shew a laudable caution in believing *only a part* of what is said. And thus a malignant Sophist may gain such a temporary advantage by the multiplicity of his attacks.—*W. R.* p. 103.

79. On the above principle that a weak argument is positively hurtful, is founded a most important maxim, that it is not only the fairest, but also the wisest plan, to *state objections in their full force* ; at least, wherever there does exist a satisfactory answer to them ; otherwise, those who hear them stated more strongly than by the uncandid advocate who had undertaken to repel

them, will naturally enough conclude that they are unanswerable.—*Ib.*

80. *Too earnest Refutation.*—It is important to observe, that too earnest and elaborate a refutation of arguments which are really insignificant, or which their opponent wishes to represent as such, will frequently have the effect of giving them importance. Whatever is slightly noticed, and afterwards passed by with contempt, many readers and hearers will very often conclude (sometimes for no other reason) to be really contemptible. But if they are assured of this again and again with great earnestness, they often begin to doubt it. They see the respondent plying artillery and musketry,—bringing up horse and foot to the charge; and conceive that what is so vehemently assailed must possess great strength. One of his refutations might perhaps have left them perfectly convinced: all of them together, leave them in doubt.—*Ib.* 104.

81. But it is not to Refutation alone that this principle will apply. In other cases also it may happen that it shall be possible, and dangerous to write *too forcibly*. Such a caution may remind some readers of the personage in the fairy tale, whose swiftness was so prodigious, that he was obliged to tie his legs, lest he should overrun, and thus miss, the hares he was pursuing. But on consideration it will be seen that the caution is not unreasonable. When indeed the point maintained is one which most persons admit or are disposed to admit, but which they are prone to *lose sight* of, or to underrate in respect of its importance, or not to dwell on with an attention sufficiently practical, that is just the occasion which calls on us to put forth all our efforts in setting it forth in the most forcible manner possible. Yet even here, it is often necessary to caution the hearers against imagining that a point is *difficult* to establish, because its *importance* leads to dwell very much on it.—*Ib.* p. 104.

82. It is very possible that our reasoning may be “dark with excess of light.” Of course it is not meant that a Refutation should ever appear (when that can be avoided) *insufficient*;—that a conclusion should be left *doubtful* which we are able to establish fully. But in combating deep-rooted prejudices, and maintaining unpopular and paradoxical truths, the point to be aimed at should be, to adduce what is sufficient, and *not much more* than is sufficient, to prove your conclusion. If (in such a case) you can but satisfy

ment that your opinion is decidedly more probable than the opposite, you will have carried your point more effectually, than if you go on, much beyond this, to demonstrate by a multitude of the most forcible arguments, the extreme absurdity of thinking differently, till you have affronted the self-esteem of some, and awakened the distrust of others. Labourers who are employed in *driving wedges* into a block of wood, are careful to use blows of no greater force than is just sufficient. If they strike *too hard*, the elasticity of the wood will *throw out the wedge*.—*W. R. p. 106.*

83. There is in some cases another danger also to be apprehended from the employment of a great number and variety of arguments; (whether for refutation, or otherwise;) namely, that some of them, though really unanswerable, may be drawn from topics of which the unlearned reader or hearer is not, by his own knowledge, a competent judge; and these a crafty opponent will immediately assail, keeping all the rest out of sight; knowing that he is thus transferring the contest to another field, in which the result is sure to be, practically, a drawn battle.—*Ib.*

84. It is generally the wisest course, therefore, not only to employ such arguments as are *directly* accessible to the persons addressed, but to *confine* one-self to these, lest the attention should be drawn off from them.—*Ib. p. 107.*

On the whole, the arguments which it requires the greatest nicety of art to refute effectually, (I mean, for one who has truth on his side,) are those which are so very weak and silly that it is difficult to make their absurdity more palpable than it is already; at least without a risk of committing the error formerly noticed. The task reminds one of the well-known difficult feat of cutting through a cushion with a sword. And what augments the perplexity, is, that such arguments are usually brought forward by those who, we feel sure, are not themselves convinced by them, but are ashamed to avow their real reasons. So that in such a case we know that the refutation of these pretexts will not go one step towards convincing those who urge them; any more than the justifications of the lamb in the fable against the wolf's charges.—*Ib.*

85. The last remark to be made under this head, is, as to the difference between simply *disproving* an error, and showing whence it *arose*. Merely to prove that a certain position is untenable, if this be done quite decisively, *ought* indeed to be sufficient to

induce every one to abandon it : but if we can also succeed (which is usually a more difficult task,) in tracing the erroneous opinion up to its *origin*,—in destroying not only the branches but the root of the error,—this will afford much more complete satisfaction, and will be likely to produce a more lasting effect.—*Ib.* p. 108.

86. The conclusion you wish to draw, you may state plainly, and avow your intention of producing reasons which shall effect a conviction of that conclusion : you may even entreat the hearers' steady attention to the point to be proved, and to the process of argument by which it is to be established.—*W. R.* p. 118.

87. A Pleader often finds it advisable to aim at establishing—in reference to the feelings entertained towards himself—what may be regarded as a distinct point from any of the above; namely, the sincerity of his own conviction. In any description of composition, except the Speech of an *Advocate*, a man's maintaining a certain conclusion, is a presumption that he is convinced of it himself. Unless there be some special reason for doubting his integrity and good-faith, he is supposed to mean what he says, and to use arguments that are at least satisfactory to himself. But it is not so with a Pleader ; who is understood to be advocating the cause of the client who happens to have engaged him, and to have been equally ready to take the opposite side. The fullest belief in his uprightness, goes no further, at the utmost, than to satisfy us that he would not plead a cause which he was conscious was grossly unjust, and that he would not resort to any unfair artifices. But to allege all that can fairly be urged on behalf of his client, even though, as a judge, he might be inclined to decide the other way, is regarded as his professional duty.—*Ib.* p. 140 & 141.

88. If however he can induce a Jury to believe not only in his own general integrity of character, but also in his sincere conviction of the justice of his client's cause, this will give great additional weight to his pleading, since he will thus be regarded as a sort of *witness* in the cause. And this accordingly is aimed at, and often with success, by practised Advocates. They employ the language, and assume the manner, of full belief, and strong feeling.—*Ib.*

89. The consideration of the character of the Speaker, and of his opponent, being of so much importance, both as a legitimate source of Persuasion, in many instances, and also as a topic of

Fallacies, it is evidently incumbent on the orator to be well-versed in this branch of the art, with a view both to the justifiable advancement of his own cause, and to the detection and exposure of unfair artifice in an opponent. It is neither possible, nor can it in justice, be expected, that this mode of persuasion should be totally renounced and exploded, great as are the abuses to which it is liable; but the Speaker is bound, in conscience, to abstain from those abuses himself; and, in prudence, to be on his guard against them in others.—*Ib.* p. 144.

90. The *place* for disparagement of an opponent is, for the first Speaker, near the close of his discourse, to weaken the force of what may be said in reply; and, for the opponent, near the opening, to lessen the influence of what has been already said.—*W. R.* p. 146.

91. Either a personal prejudice, or some other passion unfavourable to the Speaker's object, may already exist in the minds of the hearers, which it must be his business to allay. It is obvious that this will be the most effectually be done, not by endeavouring to produce a state of perfect calmness and apathy, but by exciting some contrary emotion.—*Ib.*

OF RIDICULE.

92. It is said that serious arguments of an opponent are to be met by ridicule, and his ridicule, by serious arguments (which is evidently one that might be extended, in principle, to other feelings besides the sense of the ludicrous). But it is only occasionally applicable in practice; and considerable tact is requisite for perceiving suitable occasions, and employing them judiciously. For, a failure does great injury to him who makes the attempt. If you very gravely deprecate some ridicule that has been thrown out, without succeeding in destroying its force, you *increase* its force; because a *contrast* between the solemn and ludicrous heightens the effect of the latter. And if, again, you attempt unsuccessfully to make a jest of what the persons addressed regard as strong arguments, and serious subjects, you raise indignation or contempt; and are also considered as having, confessedly, no serious and valid objections to offer.—*Ib.* p. 147.

93. Of course, regard must be had to the character of those you are addressing. If these are ignorant of the subject, superficial, and unthinking, they will readily join in ridicule of such

reasoning as the better-informed and more judicious would despise them for not appreciating. And again they may easily be brought to regard a valid argument which exposes to ridicule some sophistry, as nothing more than a joke.—*Ib.*

94. But when you wish to expose to ridicule something really deserving of it which has been advanced seriously, or to rescue from ridicule what has been unfairly made a jest of, it will usually be advisable to keep a little aloof, for a time from the very point in question, till you have brought men's minds, by the introduction of suitable topics, into the mood required,—the derisive, or the serious, as the case may be,—and then to bring them up to that point, prepared to view it quite differently from what they had done. And if this be skilfully managed, the effect will sometimes be very striking.—*Ib.*

95. Such a procedure, it should be added, is sometimes adopted unfairly; that is, men who are mortified at finding the absurdity of their conduct, their tenets, or their arguments exposed to contemptuous ridicule, will often persuade others, and even themselves, that this mortification is a feeling of pious indignation in behalf of a serious or sacred subject, against which they falsely represent the ridicule as having been directed. Great caution therefore is requisite in employing such a weapon as ridicule.—*W. R. p. 148.*

96. It will often happen that it will be easier to give a *new direction* to the unfavourable passion, than to subdue it; *e. g.* to turn the indignation, or the laughter, of the hearers against a different object. Indeed, whenever the case will admit of this, it will generally prove the more successful expedient; because it does not imply the accomplishment of so great a change in the minds of the hearers.—*Ib.*

97. *Repetition.*—The best general rule for avoiding the disadvantages both of conciseness and of prolixity is to employ *Repetition*: to repeat, that is, the same sentiment and argument in many different forms of expression; each in itself brief, but all, together, affording such an expansion of the sense to be conveyed, and so detaining the mind upon it, as the case may require.—*Ib. p. 169.*

98. Care must of course be taken that the repetition may not be too glaringly apparent; the variation must not consist in the mere use of other, synonymous, words; but what has been ex-

pressed in appropriate terms may be repeated in metaphorical ; the antecedent and consequent of an argument, or the parts of an antithesis may be transposed ; or several different points that have been enumerated, presented in a varied order.—&c. *Ib.*

99. Another end, which in speaking is sometimes proposed, is to *occupy time*. When an unfavorable decision is apprehended, and the protraction of the debate may afford time for fresh voters to be summoned, or may lead to an adjournment, which will afford scope for some other manœuvre ;—when there is a chance of so wearying out the attention of the hearers, that they will listen with languor and impatience to what shall be urged on the other side ;—when an advocate is called upon to plead a cause in the absence of those whose opinion it is of the utmost importance to influence, and wishes to reserve all his arguments till they arrive, but till then, must apparently proceed in his pleading ; in these and many similar cases, which it is needless to particularize, it is a valuable talent to be able to pour forth with infuency an unlimited quantity of well-sounding language which has little or no meaning, yet which shall not strike the hearers as unintelligible or nonsensical, though it convey to their minds no distinct idea.—*Ib.* p. 176.

OF FALLACIES.

100. By a Fallacy is commonly understood, “any unsound mode of arguing, which appears to demand our conviction, and to be decisive of the question in hand, when in fairness it is not.” Considering the ready detection and clear exposure of Fallacies to be both more extensively important, and also more difficult, than many are aware of.—*W. L.* p. 101.

101. In the practical detection of each individual Fallacy, much must depend on natural and acquired acuteness ; nor can any rules be given, the mere learning of which will enable us to *apply* them with mechanical certainty and readiness : but still we shall find that to take correct general views of the subject, and to be familiarized with scientific discussions of it, will tend, above all things, to *engender such a habit of mind*, as will best fit us for practice.—*Ib.*

102. *Logical Fallacies*.—In every Fallacy, the conclusion either does, or *does not follow from the Premises*. Where the Conclusion does not follow from the Premises, it is manifest that the fault is in the *Reasoning*, and in that alone ; these, therefore, are called

Logical Fallacies, as being properly, violations of those rules of Reasoning which it is the province of Logic to lay down.—*Ib.* p. 105.

103. *Material Fallacies*.—Where the Conclusion does follow from the Premises it may be called the Material, or Non-Logical Fallacies: of these there are two kinds; 1st, when the Premises are such as ought not to have been assumed; 2nd, when the conclusion is not the one required, but irrelevant; because your Argument is not the proof of the *contradictory* of your opponent's assertion, which it should be; but proves, instead of that, some other proposition resembling it. (*Ib.* p. 106). Thus, I am required, by the circumstances of the case, (no matter why) to prove a certain Conclusion; I prove, not that, but one which is likely to be mistaken for it;—in this lies the Fallacy.—*Ib.* p. 107.

104. *Begging the question* takes place when one of the Premises (whether true or false) is either plainly equivalent to the conclusion, or depends on that for its own reception. The most plausible form of this Fallacy is arguing in a circle; and the greater the circle the harder to detect.—*Ib.*

105. *Importance of detecting Fallacies*.—A Fallacy is to be dreaded merely as a weapon fashioned and wielded by a skilful sophist; or, if they allow that a man may with honest intentions slide into one unconsciously, in the heat of argument, still they seem to suppose that where there is no dispute, there is no cause to dread Fallacy; whereas there is much danger, even in what may be called *solitary reasoning*, of sliding unawares into some Fallacy, by which one may be so far deceived as even to *act upon* the conclusion thus obtained. By "solitary reasonings" is meant the case in which one is not seeking for arguments to prove a given question, but laboring to elicit from one's previous stock of knowledge some useful inference.—*Ib.* p. 109.

106. *Twofold danger from any false assumption*.—In refutation of Fallacies including any false assumption employed as a Premiss this consideration ought not to be overlooked; that an unsound Principle, which has been employed to establish some mischievously false Conclusion, does not at once become harmless, and too insignificant to be worth refuting, as soon as that conclusion is given up, and the false Principle is no longer employed for that particular use. It may equally well lead to some other no less mischievous result. A false premiss, according as

it is combined with this, or with that, true one, will lead to two different false conclusions.—*W. L. p. 111.*

107. *Difficulty of detecting Fallacies.*—While sound reasoning is ever the more readily admitted, the more clearly it is perceived to be such Fallacy, on the contrary, being rejected as soon as perceived, will, of course, be the more likely to obtain reception, the more it is obscured and disguised by obliquity and complexity of expression. It is thus that it is the most likely either to slip accidentally from the careless reasoner, or to be brought forward deliberately by the Sophist. Not that he ever wishes this obscurity and complexity to be perceived; on the contrary, it is for his purpose that the expression should *appear* as clear and simple as possible, while in reality it is the most tangled net he can contrive.—*Ib. p. 112.*

108. *Fallacies concealed by elliptical language.*—It is usual to express our reasoning *elliptically*, so that a Premiss (or even two or three entire steps in a course of argument) which may be readily supplied, as being perfectly obvious, shall be left to be understood, the Sophist in like manner suppresses what is *not* obvious, but is in reality the weakest part of the argument: and uses every other contrivance to withdraw our attention (his art closely resembling the juggler's) from the quarter where the fallacy lies. Hence the uncertainty before mentioned, to which class any individual fallacy is to be referred: and hence it is that the *difficulty* of detecting and exposing Fallacy, is so much greater than that of comprehending and developing a process of sound argument. It is like the detection and apprehension of a criminal in spite of all his arts of concealment and disguise; when this is *accomplished*, and he is *brought to trial* with all the evidence of his guilt produced, his conviction and punishment are easy; and this is precisely the case with those Fallacies which are given as examples in Logical treatises; they are in fact already detected, by being stated in a plain and regular form, and are, as it were, only brought up to *receive sentence*. Or again, fallacious reasoning may be compared to a perplexed and entangled mass of *accounts*, which it requires much sagacity and close attention to clear up, and display in a regular and intelligible form; though *when this is once accomplished*, the whole appears so perfectly *simple*, that the unthinking are apt to under-value the skill and pains which have been employed upon it.—*W. L. p. 112.*

109. *Fallacies concealed by lengthy discussion.*—Moreover, it should be remembered, that a very long discussion is one of the most effectual veils of Fallacy. Sophistry, like poison, is at once detected, and nauseated, when presented to us in a concentrated form ; but a Fallacy which when stated barely, in a few sentences, would not deceive a child, may deceive half the world, if *diluted* in a quarto volume. For, as in a calculation, one single figure incorrectly stated will enable us to arrive at any result whatever, though every other figure, and the whole of the operations, be correct, so, a single false assumption in any process of reasoning, though every other be *true*, will enable us to draw what conclusion we please ; and the *greater* the number of true assumptions, the more likely it is that the false one will pass unnoticed. But when you single out one step in the course of reasoning, and exhibit it as a Syllogism with one Premiss true and the other false, the sophistry is easily perceived.—*Ib.* p. 113.

110. Fallacies are very much kept out of sight, being seldom perceived even by those who employ them ; but of their practical importance there can be no doubt, since it is notorious that a weak argument is always in practice, *detrimental* ; and that there is no absurdity so gross which men will not readily admit, if it appears to lead to a conclusion of which they are already convinced. Even a candid and sensible writer is not unlikely to be, by this means, *misled*, when he is seeking for arguments to support a conclusion which he has long been fully convinced of himself ; *i. e.* he will often use such arguments as would never have *convinced* himself, and are not likely to convince others, but rather (by the operation of the converse Fallacy) to *confirm* in their dissent those who before disagreed with him.—*Ib.* p. 115.

111. It is best therefore to endeavour to put yourself in the place of an *opponent* to your own arguments, and consider whether you could not find some objection to them. The applause of *one's own party* is a very unsafe ground for judging of the real force of an argumentative work, and consequently of its real utility. To satisfy those who were doubting, and to convince those who were opposed, are much better tests ; but *these* persons are seldom very loud in their applause, or very forward in bearing their testimony.—*Ib.*

OF AMBIGUITY.

112. It is common for the two Premises to be placed very far apart, and discussed in different parts of the discourse ; by

which means the inattentive hearer overlooks any ambiguity that may exist in the Middle-term. Hence the advantage of Logical habits, in fixing our attention strongly and steadily on the *important* terms of an argument.—*W. L. p. 116.*

113. When we mean to charge any argument with the fault of “equivocal middle,” it is not enough to say that the Middle-term is a word or phrase which *admits* of more than one meaning; (for there are few that do not) but we must show, that in order for each premiss to be admitted, the Term in question must be understood in one sense (pointing out *what* that sense is) in one of the premises, and in another sense, in the other.—*Ib.*

114. *Importance of minute distinctions.*—If any one speaks contemptuously of “over exactness” in fixing the precise sense in which some term is used,—of attending to minute and subtle distinctions, &c. we may reply that these *minute* distinctions are exactly those which call for careful attention; since it is *only* through the neglect of *these* that Fallacies ever escape detection.—*Ib.*

115. For, a very *glaring* and palpable equivocation could never mislead any one. To argue that “feathers dispel darkness because they are light,” or that “this man is agreeable, because he is *riding*, and *riding* is agreeable,” is an equivocation which could never be employed but in jest. And yet however slight in any case may be the distinction between the two senses of a Middle-term in the two premises, the apparent-argument will be equally inconclusive; though its fallaciousness will be more likely to escape notice.—*Ib.*

116. Even so, it is for want of attention to *minute* points, that houses are robbed, or set on fire. Burglars do not in general come and batter down the front-door: but climb in at some window whose fastenings have been neglected. And an incendiary, or a careless servant, does not kindle a tar-barrel in the middle of a room, but leaves a lighted turf, or a candle snuff, in the thatch, or in a heap of shavings.—*Ib.*

117. In many cases, it is a good maxim, “take care of little things, and great ones will take care of themselves.”—*Ib.*

There are innumerable instance of a non-correspondence in paronymous words, as between *art* and *artful*, *design* and *designing*, *faith* and *faithful*, &c.; and the more slight the variation of meaning, the more likely is the Fallacy to be successful; for when the words have become so widely removed in sense as “pity” and

"pitiful," every one would perceive such a Fallacy, nor could it be employed but in a jest.—*Ib.* p. 118.

118. This Fallacy cannot in practice be refuted, (except when you are addressing regular logicians,) by stating merely the impossibility of reducing such an argument to the strict logical form. You must find some way of pointing out the non-correspondence of the terms in question; *e. g.* with respect to the example above, it might be remarked, that we speak of *strong* or *faint* "presumption" but we use no such expression in conjunction with the verb "presume," because the word itself *implies strength*.—*W. L.* p. 118.

119. No fallacy is more common in controversy than the present; since in this way the Sophist will often be able to misinterpret the propositions which his opponent admits or maintains, and so employ them against him. Thus in the examples just given, it is natural to conceive one of the Sophist's Premises to have been borrowed from his opponent.—*Ib.*

120. *Fallacy of Interrogations*.—The Fallacy of asking several questions which appear to be but one; so that whatever one answer is given, being of course applicable to one only of the implied questions, may be interpreted as applied to the other: the refutation is, of course, to reply *separately* to each question, *i. e.* to detect the ambiguity.—*Ib.* p. 119.

121. Much confusion often arises from ambiguity of words when unperceived. It would puzzle any one, proceeding on mere conjecture, to make out how the word "premises" should have come to signify "a building." The remedy for ambiguity is a *Definition* of the Term which is suspected of being used in two senses.—*Ib.* p. 125—6.

122. *Definition when most needed*.—It is important to observe that the very circumstance which in any case makes a definition the more necessary, is apt to lead to the *omission* of it: for when any terms are employed that are not familiarly introduced into ordinary discourse. The learner is ready to enquire, and the writer to anticipate the enquiry, what is meant by this or that term?—*Ib.*

123. *Definitions how far to be exacted*.—But here it may be proper to remark, that for the avoiding of Fallacy, or of Verbal-controversy, it is only requisite that the term should be employed uniformly in the same sense, *as far as the existing question is con-*

cerned. Thus, two persons might, in discussing the question whether Augustus was a GREAT man, have some such difference in their acceptation of the epithet "great," as would be non-essential to that question; *e. g.* one of them might understand by it nothing more than eminent intellectual and moral *qualities*; while the other might conceive it to imply the performance of splendid *actions*: this abstract difference of meaning would not produce any disagreement in the existing question, because both those circumstances are united in the case of Augustus; but if one (and not the other) of the parties understood the epithet "great" to imply pure patriotism,—*GENEROUSITY* of character, &c., then there *would* be a disagreement as to the application of the Term, even between those who might think alike of Augustus' character, as wanting in those qualities. Definition, the specific for ambiguity is to be employed, and demanded, with a view to this principle; it is sufficient on each occasion to define a Term *as far as regards the question in hand.*—*W. L. p. 127.*

124. *Arguing in a circle.*—Arguing in a circle must necessarily be unfair; though it frequently is practised undesignedly. (*Ib. p. 132*). Of course the *narrower* the Circle, the less likely it is to escape the detection, either of the reasoner himself, (for men often deceive *themselves* in this way) or of his hearers. When there is a long circuit of many intervening propositions before you come back to the original Conclusion, it will often not be perceived that the arguments really do proceed in a "Circle:" just as when any one is advancing in a *straight line* (as we are accustomed to call it) along a plain on this Earth's surface, it escapes our notice that we are really moving along the *circumference of a Circle*, (since the earth is a globe) and that if we could go on without interruption in the same line, we should at length arrive at the very spot we set out from. But this we readily perceive, when we are walking round a small hill.—*Ib. p. 132—3.*

125. If the *form of expression* of each proposition be *varied* every time it recurs,—the sense of it remaining the same,—this will greatly aid the deception.—*Ib.*

126. Of course, the way to expose the Fallacy, is to reverse this procedure: to narrow the Circle, by cutting off the intermediate steps, and to exhibit the same proposition,—when it comes round the second time,—in the same words.—*Ib.*

127. *Obliquity of expression.*—Obliquity and disguise being of course most important to the success of the *petitio principii* as well

as of other Fallacies, the Sophist will in general either have recourse to the "Circle," or else not venture to *state* distinctly his assumption of the point in question, but will rather assert some other proposition which *implies* it ; thus keeping out of sight (as a dexterous thief does stolen goods) the point in question, at the very moment when he is taking it for granted.—*Ib.*

128. Great force is often added to the employment in a declamatory work, of the Fallacy by bitterly *reproaching* or *deriding* an opponent, as denying some sacred truth, or some evident axiom ; assuming, that is, that he denies the *true* premiss, and keeping out of sight the one on which the question really turns.—*Ib.* p. 137.

129. Various kinds of proposition are, according to the occasion, substituted for the one of which proof is required. Sometimes the Particular for the Universal ; sometimes a proposition with different Terms : and various are the contrivances employed to effect and to conceal this substitution, and to make the Conclusion which the Sophist has drawn, answer, practically, the same purpose as the one he ought to have established. It will very often happen that some *emotion* will be excited—some sentiment impressed on the mind—(by a dexterous employment of this Fallacy) such as shall bring men into the *disposition* requisite for your purpose, though they may not have assented to, or even stated distinctly in their own minds, the *proposition* which it was your business to establish. Thus if a Sophist has to defend one who has been guilty of some *serious* offence, which he wishes to extenuate, though he is unable distinctly to prove that it is not such, yet if he can succeed in *making the audience laugh* at some casual matter, he has gained practically the same point.—*W. L.* p. 140.

130. So also if any one has pointed out the extenuating circumstances in some particular case of offence, so as to show that it differs widely from the generality of the same class, the Sophist, if he find himself unable to disprove these circumstances, may do away the force of them, by simply *referring the action to that very class*, which no one can deny that it belongs to, and the very name of which will excite a feeling of disgust sufficient to counteract the extenuation ; e. g. let it be a case of peculation ; and that many *mitigating* circumstances have been brought forward which cannot be denied, the sophistical opponent will reply, " Well, but after all, the man is a *rogue*, and there is an end of it ; "

now in reality this was (by hypothesis) never the question; and the mere assertion of what was never denied, *ought not*, in fairness, to be regarded as decisive; but practically, the odiousness of the word, arising in great measure from the *association of those very circumstances* which belong to *most of the class*, but which we have supposed to be *absent in this particular instance*, excites precisely that *feeling of disgust*, which in effect destroys the force of the defence.—*Ib.*

131. In all these cases, if the fallacy we are now treating of be employed for the apparent establishment, not of the *ultimate Conclusion*, but (as it very commonly happens, of a *Premiss*, (*i. e.* if the premiss required be assumed on the ground that some proposition resembling it has been proved) then there will be a combination of this fallacy with the last mentioned.—*Ib.*

132. *Combination of this Fallacy with the foregoing.*—For instance, instead of proving that “this prisoner has committed an atrocious fraud,” you prove that “the fraud he is accused of is atrocious:” instead of proving (as in the well-known tale of Cyrus and the two coats) that “the taller boy had a right to force the other boy to exchange coats with him,” you prove that “the exchange would have been advantageous to both:” instead of proving that “a man has not a right to educate his children or to dispose of his property, in the way *he thinks best*,” you show that the way in which he educates his children, or disposes of his property is not *really the best*: instead of proving that “the poor ought to be relieved in this way rather than in that,” you prove that “the poor *ought to be relieved*: instead of proving that an irrational-agent—whether a brute or a madman—can never be deterred from any act by apprehension or punishment,” (as for instance, a dog, from sheep-biting, by fear of being beaten) you prove that “the beating of one dog does not operate as an *example to other dogs*,” &c. and then you proceed to assume as premises, conclusions different from what have really been established.—*W. L. p. 140—1.*

133. It is very common to employ an ambiguous Term for the purpose of introducing the Fallacy of irrelevant conclusion: *i. e.* when you cannot prove your proposition in the sense in which it was maintained, you are to prove it in some other sense.—*Ib. p. 143.*

134. When the occasion or object in question is not such as

calls for, or as is likely to excite in those particular hearers, the emotions required, it is a common Rhetorical artifice to turn their attention to some object which *will* call forth these feelings; and when they are too much excited to be capable of judging calmly, it will not be difficult to turn their Passions, once roused, in the direction required, and to make them view the case before them in a very different light. When the metal is heated it may easily be moulded into the desired form. Thus vehement indignation against some *crime*, may be directed against a *person* who has not been proved guilty of it; and vague declamations against corruption, oppression, &c. will gradually lead the hearers to take for granted, without proof, that the measure proposed will lead to these evils, or to these advantages; and it will in consequence become the object of groundless abhorrence or admiration. For the very utterance of such words as have a multitude of what may be called *stimulating* ideas associated with them, will operate like a charm on the minds, especially of the ignorant and unthinking, and raise such a tumult of feeling as will effectually blind their judgment; so that a string of vague abuse or panegyric will often have the effect of a train of sound argument.—*Ib.*

135. *Shifting Ground.*—The Fallacy of “irrelevant-conclusion” is nowhere more common than in protracted controversy, when one of the parties after having attempted in vain to maintain his position, shifts his ground as covertly as possible to another, instead of honestly giving up the point.—*Ib.*

136. A practice of this nature is common in oral controversy especially; *viz.* that of combating *both* your opponent’s Premises *alternately*, and shifting the attack from the one to the other, without waiting to have either of them decided upon before you quit it. “*And besides,*” is an expression one may often hear from a disputant who is proceeding to a fresh argument, when he cannot establish, and yet will not abandon, his first.—*W. L. p. 144.*

137. *Fallacy of objections.*—Is to shew that *there are* objections against some plan, theory, or system, and thence inferring that it should be rejected; when that which *ought* to have been proved is, that there are *more*, or *stronger* objections, against the receiving than the rejecting of it.—*Ib.*

138. The very same Fallacy indeed is employed on the other side, by those who are for overthrowing whatever is established

as soon as they can prove an objection against it; without considering whether more or weightier objections may not lie against their own schemes; but their opponents have this decided advantage over them, that they can urge with great plausibility, "we do not call upon you to *reject* at once whatever is objected to, but merely to *suspend your judgment*, and not come to a decision as long as there are reasons on both sides:" now since there always *will be* reasons on both sides, this *non-decision* is practically the very same thing as a *decision in favor of the existing state of things*. "Not to resolve, is to resolve." The delay of trial becomes equivalent to an *acquittal*.—*Fb*, p. 145.

139. *Fallacy of proving a part of the question*.—Is to prove or disprove *some part* of that which is required, and dwell on that, suppressing all the rest.—*Ib*.

Thus if a University is charged with cultivating *only* the mere elements of Mathematics, and in reply a list of the books studied there is produced, should even *any one* of those books be *not elementary*, the charge is in fairness refuted; but the Sophist may then earnestly contend that *some* of those books *are* elementary; and thus keep out of sight the real question, *viz.* whether they are *all* so.—*Ib*. 146.

140. It will readily be perceived that nothing is less conducive to the success of the Fallacy in question, than to state clearly, in the outset, either the proposition you are about to prove, or that which you ought to prove. It answers best to *begin* with the *Premises*, and to introduce a pretty long chain of argument before you arrive at the Conclusion. The careless hearer takes for granted, at the beginning, that this chain will lead to the Conclusion required; and by the time you are come to the end, he is ready to take for granted that the Conclusion which you draw is the one required; his idea of the question having gradually become indistinct. This Fallacy is greatly aided by the common practice of suppressing the Conclusion and leaving it to be supplied by the hearer; who is of course less likely to perceive whether it be really that "which was to be proved," than if it were distinctly stated. The practice therefore is at best suspicious; and it is better in general to avoid it, and to give and require a distinct statement of the Conclusion intended.—*Ib*. p. 147—8.

141. The Fallacy now before us is, perhaps, the most common form of that confusion of thought to which those are liable who

have been irregularly and unskilfully educated ;—who have collected perhaps a considerable amount of knowledge, without arrangement, and without cultivation of logical habits.—*W. L. p. 147.*

142. *Jests* are mock-Fallacies ; *i. e.* Fallacies so palpable as not to be likely to deceive any one, but yet bearing just that resemblance of Argument which is calculated to amuse by the contrast ; in the same manner that a parody does, by the contrast of its levity with the serious production which it imitates. There is indeed something laughable even in Fallacies which are intended for serious conviction, when they are thoroughly exposed.—*Ib. p. 149.*

143. There are several different kinds of joke and raillery, which will be found to correspond with the different kinds of Fallacy. The Pun (to take the simplest and most obvious case) is evidently, in most instances, a mock-argument founded on a palpable equivocation of the Middle-Term : and others in like manner will be found to correspond to the respective Fallacies, and to be *imitations* of serious argument. It is probable indeed that all jests, sports, or games, properly so called, will be found on examination, to be *imitative* of serious transactions.—*Ib.*

144. When the objections urged by your opposite Vakeel are not only unanswerable and (what is more) *decisive*, it is the wisest way fairly and fully to confess this and abandon it altogether. There are many who seem to make it a point of honor never to yield a single point—never to retract, or (if this be found unvoidable) to “back out”—as the phrase is—of an untenable position so as to display their reluctance to make any confession as if their credit was staked on preserving unbroken the talisman of professed infallibility. But there is little wisdom in such a procedure ; which in fact is very liable to cast a suspicion on that which is really sound, when it appears that the Vakeel is ashamed to abandon what is unsound. And such an honest avowal as I have been recommending, though it may raise at first a feeble and brief shout of exultation, will soon be followed by a general and increasing murmur of approbation. The world seldom fails to applaud the magnanimity of confessing a defect or mistake, and to reward it with an increase of confidence. Indeed this increased confidence is often rashly bestowed by a kind of over-generosity in the public ; which is apt too hastily to consider the confession of an error as a proof of universal sincerity.—*Ib. 103.*

145. After the close of the arguments for the defence, the Plaintiffs' or Appellants' Vakeel is entitled to reply but not to open any fresh matters for argument.—*Rules of Practice of S. U. Sec. XIX.*

146. Should there be more Pleaders than one on one or both sides, they shall arrange between themselves, the order in which they are to conduct the oral pleadings ; but no more than one Pleader shall speak at each of the stages of the oral pleadings, nor should a pleader speak out of his turn, unless for the purpose of giving any short explanations of any paper read that may be necessary, or to clear any misunderstanding of matter previously brought by himself to the notice of the Court.—*Ib.*

147. No Pleader shall speak after a case is closed, except in answer to questions put by the Judge. Nor shall they chop with the Judge or wind themselves into the handling of the cause anew after the Judge has declared his sentence.—*B. E. 120.*

148. There is no more delicate or important point in the whole of a Pleader's duty than that of considering what evidence he will bring forward to prove his clients' Case and obtain a judgment in his favor. He will have two points to consider, First, *what* he is to prove ; Secondly, *how* he is to prove it. The first will to a certain extent have been chalked out for him by the points laid down for him by the Judge. But even here he will have to see that these points are material, and pertinent, and sufficiently wide. It will be his duty to object otherwise at the preliminary hearing when points are fixed,—or if necessary, if there has been an oversight, to urge their addition subsequently. But where the points are properly laid down, the Vakeel will still have to consider to a great extent *what* he is to prove ; for it is an error to order that a particular document shall be produced, as is often done ; that is pointing out what instruments of evidence are necessary, not what points are essential to be proved. The Vakeel will therefore first of all consider *seriatim* what points he must prove. Having done this, he comes to the second consideration—how he is to prove those points. He will see what is the best evidence which can be produced by him on each point. If he has written evidence which will exclude parol, if his written evidence is original or a copy : if the absence of the original has been sufficiently accounted for, or if sufficient notice to produce the original has been given, when it is in

the hands of the opposite party. Then he will see whether his copies are *true* copies, and capable of being proved such. He will then proceed to see what oral testimony he must produce; how many witnesses on each point, which of his witnesses he will dispense with, where he has more than enough. He should take a careful note from each man's mouth of what he knows of the matter; testing him by cross-examination—on points that seem to require it. He will see whether the witness can refresh his recollection from written evidence, and he will consider what objections are likely to be offered to the reception of his evidence written and oral, and how those objections are to be met and overcome. Then he will consider what is likely to be the evidence offered by the other side. He will consider whether such documentary evidence as the case discloses, or as has been filed, is open to objections; and what: and he will institute inquiry touching the character and antecedents of his adversary's witnesses, so as to be prepared for topics of his cross-examination independent of those which may arise on the examinations in chief. If these matters be not attended to in time, the best case may be lost through want of care or sufficient preparation.—*N.* § 671.

SECTION IX.

Pleadings in Criminal case before the Court of Session.

149. Before the commencement of a trial by Jury the names of the Jurors shall be called aloud and upon the appearance of each juror the accused person shall be asked if he objects to be tried by such Juror. Any objections may then be made to such juror by the accused person or by Government Pleader &c.—*Sec.* 343, *Act XXV of 1861*.

150. Objections may be taken on any of the following grounds.—*Ib.* 344.

1) Any grounds of disqualification within *Sec.* 334 whereby the following persons are declared incapable of serving as jurors or as assessors.

• *First.*—Persons who hold any office in or under the said court.

Second.—Persons executing any duties of Police or entrusted with any functions.

Third.—Persons who have been convicted of any offence against

the State, or of any fraudulent or other offence which (in the judgment of collector) renders them unfit to serve on the Jury.

Fourth.—Persons who are afflicted with any infirmity of the body or mind, sufficient to incapacitate them from serving.

Fifth.—Persons who by habit or religious vows, have relinquished all care of worldly affairs.

2) Persons standing in the relation of husband, master or servant, land-lord or tenant to the person alleged to be injured or attempted to be injured by the offence charged, or to the person on whose complaint the prosecution was instituted or to the person accused; being in the employment on wages of either of such persons; being Plaintiff or Defendant against either of such persons in any Civil Suit or having complained against or having been accused by either of such persons in any Criminal prosecution.

3) Any circumstance which in the judgment of the Court, is likely to cause prejudice against or favour to either of such persons.

151. When the Court is ready to commence the trial, the accused person shall be brought before it, and the charge shall be read and explained to him and he shall be asked whether he is guilty of the offence charged or claims to be tried. If the accused person plead guilty, the plea shall be recorded and the accused may be convicted thereon.—*Sec. 362 of the Crim. Pro.*

152. If the accused person refuse to plead, or shall claim to be tried, the Court shall proceed to try the case, taking all the evidence that is forthcoming.—*Ib. Sec. 363.*

153. When the Prisoner has a special matter to plead in abatement or in bar, or if the indictment be demurrable he should plead it or demur at the time of arraignment before the plea of not guilty.—*Arch. 111.*

154. When the case for the prosecution has been brought to a close, the accused person shall be called upon to enter upon his defence, and to produce his evidence.—*Sec. 372 of the Crim. Pro.*

155. The court, at the close of the evidence, on behalf of the accused person if any evidence is adduced on his behalf, or otherwise at the close of the case for the prosecution, may put any question to the accused person which it may think proper. It

shall be in the option of the accused person to answer such question.—*Ib.* 373.

156.—The accused person or his Counsel or Agent may at his option, address the court at the close of the case for the prosecution, or at the close of any evidence that may be adduced on his behalf, or if any question shall be put to the accused person by the Court, after such questions shall have been so put.—*Ib.* 374.

157. If any evidence is adduced on behalf of the accused person, or if he answers any questions put to him by the Court, the Prosecutor, or the Counsel or Agent for the prosecution shall be entitled to reply (*Ib.* 376.) Even if the evidence for the Defendant be only to his character, it gives, in strictness, a right of reply.—*Arch.* 147.

158. Where a Prisoner is undefended he shall cross-examine the witness for the prosecution if he thinks fit. Where the Defendant himself wishes to address the jury and examine and cross-examine the witnesses he will be allowed to do so and his Counsel will also be allowed to argue any points of law that may arise in the course of the trial and to suggest questions to him, for the cross-examination of witnesses.—*Ib.* 46.

159. A party who denies the jurisdiction of the Court to try him, must allege the reason of his exemption specially, and loses the advantage of it if he submits to take his trial.—*M. Com.* 294.

160. A plea of "Not Guilty" throws upon the prosecution the burthen of proving every thing that is necessary to make out the crime charged. Where a *prima facie* case has been made out, the person may either produce evidence to disprove it, or to justify it. For instance a man charged with an assault, may either show that he never committed the offence, or that he used the violence imputed to him in the exercise of his duty. Under this plea all objections may be taken which show that the acts proved do not constitute the legal definition of a crime.—*Ib.* 295.

161. In examining witnesses two things are principally to be attended to. 1st that the questions be pertinent to the matter immediately in issue; and 2ndly that they be not leading questions (*Arch.* 253). No question should be asked of a witness, the probable answer to which cannot have a tendency to prove the offence or defence or other matter put in issue by the pleadings. In the case of circumstantial the Courts of necessity allow of a

greater latitude in this respect ; but still in this case, the questions must be such as are likely to elicit evidence of facts from which the Jury may reasonably presume the guilt or innocence of the Prisoner.—*Nort. Sec. 254.*

162. If an irrelevant or leading question be put, the Counsel on the other side should immediately interpose and object to it. So, if a witness be asked whether a certain representation was made, the opposite Counsel may interpose, and ask him whether the representation in question were by parol or in writing ; for if the latter the writing must be produced.—*Id.*

163. The advocate should always remember whether he is the attacking or defending party, and beware of undertaking the offensive before he is strong enough, or assuming the *onus probandi* when he ought to content himself with resisting his adversary. This is a very common, because very natural fault in the defence of criminal cases. Oftentimes the only chance of escape is that the proof against the accused may fall short, and all the energies of his advocate should be directed to show that it does so. But if, abandoning this defensive attitude, he talks of the accused as an innocent man whom it is sought to oppress, denounces the prosecution as founded in spite, and the evidence by which it is supported as based on perjury, and fails, as without evidence or facts he must fail, in convincing the Jury of this, the condemnation of his client follows as matter of course.—*N. § 428. (s).*

164. It has been laid down, that no material difference exists, in regard to the rules of evidence, between criminal and civil procedure—that what may be received in the one case may be received in the other, and what is rejected in the one case ought to be rejected in the other—that, in short, “ a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence.” In either mode of procedure, for instance, civil or criminal, the following rules obtain : that the proofs adduced must be relevant to the issue—that the best evidence which the nature of the case will admit of must be given—that secondary evidence will only be receivable where the best and most direct evidence cannot be had—that hearsay is not in general admissible as evidence, because the individual whose words are spoken to was not sworn nor can be submitted to cross-examination—that entries made by a person since deceased when

against his own interest, or made in the usual course of business may be received—that the Court must construe written documents, and the Jury must decide upon the facts. The rules just stated, it will be obvious, are applicable as well in civil as in criminal Courts, whereas the following more frequently present themselves to notice in the latter—that our law presumes in favour of the innocence of an accused—that it regards the evidence of accomplices with suspicion—that a confession, whether judicial or extra-judicial, i. e., whether made before a magistrate or in Court and in the due course of legal proceeding, or made elsewhere and under other circumstances—is admissible provided it was voluntary, and must, if admissible at all, be received in its entirety—that a dying declaration may be received in evidence on a trial for homicide, where the death of the deceased is the subject of the charge and the circumstances of the death the subject of the dying declaration (*B. C.* 999.) When the judge has a doubt, the prisoner should have the benefit of it (*N.* § 830.) The maxim is “that it is better ten guilty men should escape than one innocent man suffer.” “It is always safer to err in acquitting than in punishing, on the side of mercy than of justice.” The law says on the other hand, “He imperils the innocent who spares the guilty; and again, “When the guilty man escapes the judge himself is condemned.”—*N.* § 846.

CHAPTER II.

Actions.

165. The right of action exists where a legal claim to damages or the recovery of some specific thing has accrued.—*B. C.* 74.

166. No action may be brought for every substantial wrong, still less every imaginary grievance, nor for every kind of damages or loss occasioned by the act of another.—*Ib.* 75

167. A legal wrong is a wrong cognizable or recognized as such by the Law.—*Ib.*

168. A damage is not merely pecuniary, but an injury imports a damage where a man is thereby hindered of his right given him by Law (*Ib.* 85.) Action may be brought for damages unaccompanied by tortious or wrongful acts.—*Ib.* 75.

169. No action may be brought for damages unaccompanied by legal wrong; as, for the loss inflicted on a schoolmaster by the establishment of a rival school adjacent to his own, or on a millowner by the erection of a mill contiguous to his own, and the consequent loss of custom. Now, in neither of these cases is there any *tortious* element apparent, that is, *injuria* or legal wrong upon which an action could be founded.—*Ib.* 76.

170. A landlord cannot, by building a house near the margin of his land, prevent his neighbour from excavating his own land, although it may endanger the house: nor from building on his own land although it may obstruct windows, unless, indeed, by lapse of time, the adjoining land has become subject to a right analogous to what, was called a servitude.—*Ib.* 77.

171. A comment upon a literary production, exposing its follies and errors, and holding up the author to ridicule, will not be deemed a libel, provided such comment does not exceed the limits of fair and candid criticism, by attacking the character of the

writer unconnected with his publication; and a comment of this description every one has a right to publish, although the author may suffer a loss from it. In such a case, although there be *damnum*, there is no *injuria*; and even the loss is that which the party ought to sustain, inasmuch as it is presumably the loss of fame and profits to which he was not fairly entitled.—*B. C. 77.*

172. An action will not lie against an attorney, who, being retained to sue for a debt a person of the same name as the Plaintiff, by mistake and without malice takes all the proceedings to judgment and execution inclusive against the plaintiff.—*Ib. 78.*

173. The owner of a land may dig beneath its surface at his free will and pleasure; and if, in so digging, he casually does an injury to his neighbour—as by draining off the water from his well—such injury cannot, in the absence of any prescriptive right, become the foundation of an action.—*Ib. 79.*

174. Great care is, however, often necessary in determining whether or not a particular mode of enjoying a property is innocent and lawful; and “the books of Reports,” it has been said, “abound with decisions restraining a man’s acts upon and with his own property, where the necessary or probable consequence of such acts is to do damage to others.—*Ib. 81.*

175. A., seized in fee of land next adjoining the land of B., erect a new house on his land “and part of the house is erected on the confines of his land next adjoining the land of B., if B. afterwards digs his land near to the foundation of the house of A., but not touching the land of A., whereby the foundation of the house and the house itself fall into the pit, still no action lies at the suit of A., against B., because this was the fault of A. himself that he built his house so near to the land of B., for he could not by his act hinder B. from making the most profitable use of B.’s own land.”—*Ib. 82.*

176. A man who has land next adjoining to mine, cannot dig his own land so near to mine, that thereby my land shall fall into his pit; and for so doing, if an action were brought, it seems clear, on principles of natural justice, that it would lie.—*B. C. 42.*

177. If the owner of land builds two houses upon it, adjoining each other, so as to require mutual support, and a subdivision of

the land takes place, the mutual right to support will still be enjoyed by each owner against his neighbour.—*Ib.* 83. (b)

178. An action will lie against a banker, having sufficient funds in his hands belonging to a customer, for refusing to honour his cheque, although the customer did not thereby sustain any actual loss or damage.—*Ib.* 86.

179. Trespass is maintainable for an entry on the land of another, though no real damage be occasioned thereby one main reason being, that repeated acts of going over the land might eventually be relied upon as evidence of title to do so, and thereby the *right* of the plaintiff to the absolute enjoyment of the land might be injuriously affected.—*Ib.* 89.

180. Procurement of the violation of a right is* a cause of action in all instances where the violation is an actionable wrong,—as in violations of a right to property, whether real or personal, or to personal security; he who procures the wrong, is a joint wrong-doer, and may be sued either alone or jointly with the agent in the appropriate action, for the wrong complained of.—*B. C.* 94.

181. The law gives no private remedy for anything but a private wrong; therefore no action lies for a public or common nuisance, but an indictment only; because, the damage being common to all the king's subjects, no one can assign his particular proportion of it, or, if he could, it would be extremely hard if every subject in the kingdom were allowed to harass the offender with separate actions. Where, however, an individual suffers from an indictable offence, as a nuisance, extraordinary damage—that is, damage over and above that which in common with the rest of

* *Vadenburgh v. Traux*: there the defendant had persued another with a view to assaulting him, and had thus driven him for protection into the plaintiff's shop, where, in consequence of the persued party running against a cask of wine, injury was done. It was contended, upon these facts, that the defendant was not liable, inasmuch as the damage was occasioned, not directly by him, but by a third party, who might properly be regarded as altogether a free agent; the Court, however, took a different view of the matter before them, remarking that it may be laid down as a general rule, that, when "one does an illegal or mischievous act, which is likely to prove injurious to others, and when he does a legal act in such a careless and improper manner that injury to third persons may probably ensue, he is answerable in some form of action for all the consequences which may directly and naturally result from his conduct."—*B. C.* 95.

the community he sustains, he will be entitled, in respect of such special and peculiar damage, to maintain an action.

182. The following are some instances for what things action may be brought, and for what they may not.—

Actionable—For personal custody of a Wife,—For a Parsee's daughter wheedled by the mother.—*S. D. P.* 154 of 1860. For damages for pecuniary losses sustained by the abduction of the Wife punished already criminally,—damages sustained by a false charge having been preferred defaming the character and causing wrongful imprisonment (*M. G.* 15). Formerly, suits for reading a particular muntrum, suits involving the right of particular caste to wear shoes and whitewash their houses, suits for having an idol stopped to make offering thereto, suits to establish right to priority in receiving betel, suit to establish a right of setting up public worship of idols on the private ground of those so doing, suits to establish a right of priority in receiving teertum, and also the right to reception of garland, were entertained by Civil Courts.—But it was decided by Sudder Udalt in *S. A. S.* No. 94 of 1861 dated 20th November 1861, that the Courts have no jurisdiction in matters of dispute relating purely to the Constituents of religious worship, and in no respect embracing any civil rights.

Not-actionable—Damages alleged to have been sustained by mere refusal to eat with another in line (*S. D.* page 60 of 1859.)

* *Wilkes v. The Hungerford Market Company* should be consulted: there the plaintiff (a shopkeeper) brought his action for loss and damage sustained by him in his business by reason of an undue obstruction caused by the defendants in the public way and thoroughfare in which his shop was situated, by keeping up certain hoards used for building purposes for an unreasonable time. After verdict for the plaintiff, it was objected, in this case, that the grievance thus complained of was a public injury, for which, indeed, an indictment might lie, but which was not the subject of an action. The Court, however gave a judgment in favour of the plaintiff, on the following grounds:—the injury to the plaintiff is the loss of a trade, which, but for this obstruction to the general right of way, he would have enjoyed; and the law has said, from the Year-Books downwards, that, if a party has sustained any particular injury, beyond that which affects the public at large, an action will lie for redress. Is the injury in the present case of that character or not? The plaintiff, in addition to a right of way which he enjoyed in common with others, had a shop on the road side, the business of which was supported by those who passed—all who passed had the right of way, but all had not shops.—*B. C.* 97.

Damages alleged to have been sustained by Plaintiffs in consequence of the Defendant having, on the occasion of marriage in his family, erected a pandal of a description to which he was not entitled.—*Ib.* Page 76. • Damages alleged to have been sustained from the departure of adequate use of terms of Address in a letter,—this being merely hurtful to another's feeling.—*Ib.* Page 109. Suits for contribution towards the expenses of performing Holy festivals, which is purely voluntary.—*Ib.* Page 155. Suits for alteration of Registry *H. C. S. A. S.* No. 71 of 1865. (See also page 301, Vol. I. as regards Hindu Priests.)

Suits for altering the Public assessments, or for remission.—(*M. G. Page* 17.) But Suits to try questions of liability to the public revenue may be entertained *II. H. C. R. Page* 167.

Suits for recovery of Costs in Criminal Cases.—*M. G. Page* 18.

Suits to give effect to an agreement in the nature of Champerty —*Ib.*

183. Champerty* is properly a bargain between a Plaintiff or a Defendant in a cause to divide land or other matter sued for between them if they prevail at law ; whereupon the champertor is to carry on the parties suit at his own expenses.—*Stor. E. J.* § 1408.

184. The purchase of choses in action is also Champerty. In order to constitute champerty, there need not necessarily be a bargain to divide the gains (*S. D. Page* 46 and 151 of 1858 and *Page* 8 of 1859). The purchase of a Vakeel's claim for his fees was also held champerty.—(*Ib.* *Page* 269 of 1860.) Mere assisting of another in the conduct of a suit is not champerty. A Defendant got a decree to redeem land, and being unable to pay, he may justly assign his right to another.—*S. D. P.* 87, 88, of 1862.

185. The chose in action is "where a man hath a cause, or may bring an action for some duty due to him," as, an action of debt upon an obligation, an action of a Covenant of trespass, or the like and indeed where a thing is not in possession, but for the recovery of which a man is driven to his action, and consequently enjoys a right merely.—*B. C.* 441. ३१

* The law of Champerty and maintenance does not apply to natives of India. The Courts must look to the general principle regarding public policy.—*I. H. C. R. P.* 153.

186. A right of action cannot arise out of fraud or in other words an action cannot be maintained which is founded in fraud. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments, which involve a breach of legal or equitable duty, trust, or confidence, justly reposed and are injurious to another, or by which an undue and unconscientious advantage is taken of another. And courts of equity will not only interfere in cases of fraud to set aside acts done; but they will also if acts have by fraud been prevented from being done by the parties, interfere, and treat the case exactly as if the acts had been done.

187. The following is an enumeration of the different kinds of frauds. First: Fraud, which is *dolus malus*, may be actual arising from facts and circumstances of imposition, which is the plainest case. Secondly: It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other; which are inequitable and unconscientious bargains, and of such even the common law has taken notice. Thirdly: Fraud, which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that it must be proved, not presumed. But it is wisely established in the court of chancery, to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience, as to take advantage of his ignorance. Fourthly: Fraud, which may be collected and inferred, in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons, not parties to the fraudulent agreement. Fifthly: Fraud, in what are called catching bargains with heirs, reversioners, or expectants, in the life of the parents, which indeed seems to fall under one or more of the preceding heads.—*Stor. E. J.* § 187—8.

188. Fraud, then, being so various in its nature, and so extensive in its application to human concerns, it would be difficult to enumerate all the instances in which course of equity will grant relief under this head.—*Id.* 189.

189. Courts of equity do not restrict themselves by the same rigid rules as courts of law do, in the investigation of fraud, and

in the evidence and proofs required to establish it. It is equally a rule in courts of law and courts of equity that fraud is not to be presumed; but it must be established by proofs. Circumstances of mere suspicion, leading to no certain results,* will not, in either of these courts, be deemed a sufficient ground to establish fraud. On the other hand, neither of these courts insists upon positive and express proofs of fraud; but each deduces them from circumstances affording strong presumptions. But courts of equity will act upon circumstances, as presumptions of fraud, where courts of law would not deem them satisfactory proofs. In other words, courts of equity will grant relief upon the ground of fraud, established by presumptive evidence, which evidence courts of law would not always deem sufficient proof to justify a verdict at law.—*Stor. E. J.* § 190.

190. No action arises from a base cause, or from an illicit agreement, or which is against the law. Whenever Courts of Law see such attempts made to conceal such wicked deeds, they will break away the whole varnish and show the transactions in their true light.—*N.* § 641.

191. Therefore those who come into a Court of Justice to seek redress must come with clear hands. No polluted hand shall touch the pure fountain of justice.—*B. L. M.* 659.

How, it may be asked then, shall a defendant who shows his own pollution who does not come into court with clean hands be allowed to defend himself by showing that he himself is tainted.—*N.* § 642.

But the principle of Public policy is “No Court will lend its aid to a man who sounds his cause of action upon an immoral or illegal act.” If from the Plaintiff’s own stating or otherwise, the cause of action appears to arise out of fraud or the transgression of a positive law of the country, there the Court says “he has no right to be assisted.” It is upon that ground the Court goes, not for the sake of the Defendant but because they will not lend their aid to such a Plaintiff. So if the Plaintiff and Defendant were to change sides, and the Defendant was to bring his action against Plaintiff, the latter would then have the advantage of it; for where both parties are equally in fault, the condition of the Defendant is the better.—*Ib. and II. H. C. R., p. 249.*

192. A personal right of action dies with the person (*B. L. M.* 811). This equally holds good as regards a Defendant; thus

where a person suffers from the official acts of a Collector, he has no remedy upon the death of such Collector, against his successor.—*S. D. P.* 65 of 1860.)

193. A Suit cannot be brought against several Defendants to eject one and obtain a declaration of title against the rest. (*I. H. C. R.*, p. 252.) In such Suits the Plaintiff is bound to establish his title affirmatively.—(*Ibid* p. 171 of 1864-5.)

194. Where a judgment was passed against several Defendants jointly and severally and some of them paid the whole they might sue the others for contribution. But one tortfeasor cannot recover contribution against another.—*I. H. C. R.*, p. 411 n.—*See also* page 391 n. to get back purchase money, where the purchase was held invalid.

CHAPTER III.

Torts Generally

195. A tort is described in statutory language as “a wrong, independent of contract.” It involves the idea, if not of some infraction of law, at all events of some infringement or withholding of a legal right—or some violation of a legal duty.—*B. C.* 658.

196. An action of *tort* will lie for a direct injury to the person or property, for the wrongful taking or conversion of goods, for consequential damage: the right of action for a tort being founded 1. on the invasion of some legal right, or 2. on the violation of some duty towards the public productive of damage to the plaintiff, or 3. on the infraction of some private duty or obligation productive likewise of damage to the complainant.—*Ib.*

First, then, as to the class of cases in which complaint is made of the invasion of some legal right—(that is, of some legal right actually in the possession of the complainant, and to the enjoyment whereof he is exclusively entitled,)—ex. gr. where wrong is done to the person or reputation—where goods or tortiously converted, or a direct injury is done to property. Here, a plaintiff, in order to entitle himself to damages, *may* be called upon to shew two things—the existence of the right alleged, and its violation. (*Ib.* 659.) In the case of *Marsh v. Billings* it was decided that a coach proprietor running carriages between a railway station and a town has no right falsely to hold himself out as being in the employment or under the patronage of a particular hotel-keeper in such town, by affixing to his carriages, &c., the name of the hotel, this being done to the detriment of some other party lawfully entitled to the privilege in question. And, in the case just cited, it was further held, that the representation thus falsely made for the purpose of enticing passengers from the plaintiff's carriages would be a fraud on him, and a violation of his rights, for which an action would lie *without proof of actual or specific damage*.—*B. C.* 661.

Secondly. An action *ex delicto* may be founded on the violation of some public duty, (i. e. of some duty towards the public), and consequent damage to the complainant. Now, here three different matters must be proved in order to entitle the plaintiff to a verdict, viz. the existence of the alleged duty—its breach—and damage: the first of which items, viz. the existence of the public duty, must be shewn, either by bringing the facts of the case within the reach and control of some acknowledged doctrine of the common law, or by shewing that they are within the words, spirit, or purview of an Act of Parliament.—*Ib.*

Under the term “public duty,” include the duty of refraining from doing, as well as that of doing, acts of a particular kind or tendency—Thus—

1.) Placing an instrument (say a loaded gun) dangerous in its existing state and calculated to inflict damage on those who were to come in contact with it.—*Ib.* 662.

2.) Obstructing a public thoroughfare by leaving a heap of stones in the street. It is the duty of the owner of a house adjoining a public footway to fence them in such a manner as to prevent damage to any one lawfully passing along the public way.—*Ib.* 663.

3.) Keeping mischievous animal accustomed to attack and bite mankind with knowledge that it is so accustomed.—*Ib.* 662.

4.) Collision at sea—It is the duty of a person using a public navigable river, of a vessel of which he possessed, and has the control and management to use reasonable skill and care to prevent mischief to other vessels; and in case of a collision arising from his negligence, he must sustain without compensation, the damage occasioned to his own vessel, and is also liable to pay compensation for that sustained by another navigated with due skill and care. And this liability is the same whether his vessel be in motion or stationary, floating or aground, under water or above it.—*B. C.* 664.*

* There are four possibilities under which damage will be caused by collision between two vessels.—*B. L. M.* 344.

1st. It may happen without blame being imputable to either party, as were the loss occasioned by a storm or any other *vis major*. In that case, the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree.—*Ib.*

The maxim is "Enjoy your own property in such a manner as not to injure that of another person" (*B. L. M.* 327). It is *prima facie* competent to any man to enjoy and deal with his own property as he chooses. He must, however, so enjoy and use it, as not to affect injuriously the rights of his fellow subjects. Where rights are such as, if exercised to conflict with each other, we must consider whether their exercise by either party be not restrained by the existence of some duty imposed on him towards the other. A man cannot by his tortious act impose a duty on another.—*Ib.* 348.

197. Action will lie for breach of public duty only where plaintiff suffers some special damage, differing in kind from that which is common to others.*—*B. C.* 663.

198. Where, an action is brought for damage caused by breach of a public duty, the damage, and not the breach of duty, is that for which the complainant sues—his object being,—not to vindicate a right on behalf of the public, but—to recover compensation for a wrong done to himself.—*B. C.* 666.

199. A public duty may also be imposed, in part or wholly, by the statute law; when this is so, the precise nature and extent

2nd. A misfortune of this kind may arise where both parties are to blame where there has been a want of due diligence or of skill on both sides. In such case the Rule of law is that the loss must be apportioned between them.—*Ib.*

3rd. It may happen by the misconduct of the suffering party only; and then the rule is that the sufferer must bear his own burthen.—*Ib.*

4th. lastly. It may have been the fault of the Ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other.—*Ib.*

* *Ellis v. The Sheffield Gas Consumers Company*, the action was brought against a registered joint stock company, who had contracted with an individual for the laying down of their gas pipes in the town of Sheffield, without having obtained any special powers for that purpose. It appeared, that, in the course of making the necessary excavations, a heap of stones had been left in one of the streets, over which the plaintiff, whilst passing in the dark, fell—thus sustaining an injury. The declaration charged, that the defendants had committed a nuisance in obstructing, without due powers, the public thoroughfare; and the plaintiff having obtained a verdict, it was contended, that the action should have been brought against the contractor whose workman has caused the injury, and not against the company; but Lord Campbell, C. J., observed, this "is simply the case of persons employing another to do an unlawful act, and damage to the plaintiff from the doing of such unlawful act."—*B. C.* 663.

of the statutory duty must of course be determined by reference to the words of the Act creating it.*—*Ib.* 668.

200. Where any law requires one to do any act for the benefit of another or to forbear the doing of that which may be to the injury of another, though no action be given in express terms by the law for the omission or commission, the general rule of law is that the party so injured shall have an action. But no action will lie for the infringement of a right created by statute where another specific remedy for infringement is provided by the same statute.—*B. C.* 675.

201. It was, however, held that the mere imposition of a penalty for the breach of a statutory duty will not necessarily

* *Fawcett v. The York and north Midland R. C.*—that was an action on the case against the company just named, the declaration in which charged, that, under certain acts of Parliament, the defendants were required to keep closed the gates leading from an adjoining highway on to their railway, so as to prevent cattle or horses passing along the road from entering thereupon, save and except at such times as the gates were necessarily open for the purpose of allowing carriages and cattle, &c., to cross the line. The breach alleged was, that the defendants, “disregarding their duty and the statutes in that behalf, did not maintain good and sufficient gates across each end of the said highway at the point where the same was crossed by the railway,” and did not keep the gates across the said highway at that point shut and closed, but omitted to do so during long spaces of time, and when the gates were not required to be open for other purposes; such being the gravamen of the charge, the damage alleged was, that certain horses belonging to the plaintiff, and at the time of the happening of the alleged wrongful act lawfully being on the highway in question, strayed from thence on to the railway, and were there run-down and killed by a train of carriages.

Now, it appeared in evidence that the plaintiff's horses had escaped from an adjacent field belonging to him on to the highway, and an issue was accordingly raised on the record, as to whether or not the horses could be said to have been “lawfully” upon the highway in question, before passing through the gate belonging to and under the control of the company. The Court of Queen's Bench, however, in the first place, thought, that, as against the defendants, the horses were lawfully on the highway, and, this point being disposed of, further held, that the railway company were bound and required to keep the gate in question shut at all times, except those specified in their Act; and that, having been guilty of a breach of their duty in this behalf, and having thus occasioned damage to the plaintiff, they were legally compellable to make it good. In this case accordingly, the gist of the action was the wrongful breach of a statutory public duty cast on the defendants, coupled with consequential damage to the complainant.—*B. C.* 671.

deprive an individual injured thereby of an action *ex delicto* for damages. For the duty created by such Act or Statute being of public nature, the Defendant would be subject to an indictment for a breach of it, which remedy is impliedly taken away by the provisions in the act imposing a penalty; there was nevertheless beyond a public wrong a special and particular damage sustained by Plaintiff by reason of the breach of duty by the Defendant, for which he could have no remedy unless an action on the case at his suit were maintainable.—*Ib.* 669.

202. If the performance of a new duty created by Act of Parliament, is enforced by the penalty *recoverable by the party aggrieved* by the non-performance, there is no other remedy than that given by the act, either for the public or private wrong.—*Ib.*

203. It may be concluded that a statutory duty towards the public may consist either in doing, or in abstaining from doing some particular act—that “if the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures”,—that the non-performance of a legal obligation of this kind will not be actionable without special damage,—and further, that “where any law requires one to do any act for the benefit of another, or to forbear the doing of that which may be to the injury of another, though no action be given in express terms by the law for the omission or commission, the general rule of law in all such cases is that the party so injured shall have an action.”—*B. C.* 675.

204. A private duty may exist at common law, for breach whereof, coupled with consequential damage, an action will be sustainable.—*Ib.* 677.

First. Although tort differs essentially from contracts as the foundation of an action, it not unfrequently happens that a particular transaction admits of being regarded from two different points of view, so that when contemplated from one of these it presents all the characteristics of a good cause of action *ex contractu*; and, when regarded from the other, it offers to the pleader's eye sufficient materials whereupon to found an action *ex delicto*. Thus carries warrant the transportation and delivery of goods intrusted to them; attornies, surgeons, and engineers undertake to discharge their duty with a reasonable amount of skill, and with integrity, and for any neglect or unskilfulness by individuals belonging to one of these professions, a party who

has been injured thereby may maintain an action either in tort for the wrong done or in contract at his election. In short, wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract,—if there is a breach of a duty in the course of that employment, the plaintiff may recover either in tort or in contract.—*Ib.* 677—8.

Where the tort complained of flows from a contract express or implied, there is manifestly direct *privity* between the parties. It must not, however, thence be inferred that *privity* is necessary to support an action *ex delicto*: the general rule being that no *privity* is required to support an action *ex delicto** A. (a stage coach proprietor) contracts with B. to carry his servant (C.), and in so doing is guilty of negligence, which causes injury to C., and consequent damage, by reason of loss of service, to his master.—Under these circumstances, A. may be sued in an action *ex contractu* by B.,—and in an action *ex delicto* by C., *privity* not being needed to support such latter action, which is founded upon the principle,—that, where a coach proprietor undertakes to convey a passenger, and does so negligently, he is answerable for the consequences.—*B. C.* 679.

Langridge v. Lavy.

* The plaintiff's father purchased of the defendant a gun, warranted to have been made by a particular maker, stating at the same time that the gun was required for the use of himself and his sons. The plaintiff, having been injured by the bursting of the gun, sued the defendant for damages in an action on the case. At the trial it was proved that the gun had not, in fact, been made by the particular individual named in the warranty; and a general verdict, with heavy damages, was found for the plaintiff. The defendant having moved in arrest of judgment, the Court were called upon to decide as if the following facts had been actually found by the jury, viz. that the defendant had *knowingly* sold the gun in question to the father for the purpose of being used by the plaintiff, and had *knowingly* made a false warranty that this might be safely done, in order to effect the sale; and further, that the plaintiff, on the faith of such warranty and believing it to be true, used the gun, and thereby sustained damage. Now here it was contended, on behalf of the defendant, that there was no *privity* whatever between himself, and the plaintiff—that there was no breach shewn of any public duty,—nor even a violation of any private right existing between the parties to the action. The Court, however, held, that the defendant, having been guilty of deceit, was responsible for its consequences whilst the instrument sold by him was in the possession of an individual to whom his fraudulent statement had been communicated, and for whose use he knew that it was purchased.

It must not, however, be inferred from the preceding case, that "wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrong-doer." Such a principle, if recognized, would impose an indefinite extent of liability and lead to the "most absurd and outrageous consequences."—*B. C.* 682.

If no limit were imposed on the right to sue in tort for an injury originating in contract, but without privity between the contractor and the injured party,—a master would be responsible to his servant for the defective construction of the carriage, which conveyed them both,—for the negligence, consequently, of his coachmaker, of his harnessmaker, or his coachman. To prevent consequences like these, and the boundless spread of litigation which would thence ensue, we need entertain little doubt that our Courts will always strenuously incline.—*Ib. N. (s).*

Second. A right of action *ex delicto* may also exist by virtue of "the confidence induced by undertaking any service for another," which is a sufficient legal consideration to create a duty in the performance of it.—*Ib.* 684.

The rule here stated is one of much importance, and applies so as to fix with liability even an unremunerated bailee or agent, who, having actually entered on the performance of his duties, is guilty of negligence in discharging them.—The rule in question cannot however be extended, so as to render a mere gratuitous agent guilty for nonfeasance; as for instance,—in refusing to assume the office which he had voluntarily offered to assume,—the reason being that, under the circumstances now supposed, there would be no consideration at all to support the promise of the agent.—*Ib.*

Thus,—A. is the owner of a vessel, which B. *voluntarily* undertakes to get insured; B. neglects to do so, and the vessel being lost, A. thus sustains damage through the non-performance of his undertaking by B.,—A. will be without redress.—*Ib.*

The *third* class of cases, founded on the breach of a private duty and consequential damage, are those where fraud, on the part of the defendant, prejudicing the plaintiff, was committed.—*B. C.* 685.

Fraud and deceit in the defendant, and damage to the plaintiff it has been said "are a sufficient foundation for the action

on the case, though no benefit accrue to the defendant. The action will lie whenever there has been the assertion of a falsehood, with a fraudulent design, as to a fact, when a direct and positive injury arises from such assertion." In any case of this kind the plaintiff's cause of action is that he has been damaged by the defendant's fraud. Simple fraud gives no cause of action, and unless the plaintiff can shew that he has been injured by it he will not succeed.—*Ib.*

In the *fourth* and last class of cases *ex delicto* is founded upon the *malicious* doing of a wrongful act and consequential damage to the plaintiff.—*Ib.*

SECTION I.

Torts to the person and reputation.

205. Torts to the Person, include (1.) Bodily injuries, whether direct, as assault and battery; or consequential, resulting from negligence or otherwise; (2.) Injuries to the health or comfort of an individual; (3.) Torts which effect personal liberty.—*Ib.* 689.

1) To the constitution of a right of action for a bodily injury, whether direct or consequential, the existence of an evil intention in the mind of the wrong-doer is not essential. "Though a man doth a lawful thing, yet if any damage do thereby befall another, he shall answer it, *if he could have avoided it.*" Thus, "if a man assault me, and I lift up my staff to defend myself, and in lifting it up [*undesignedly*] hit another, an action lies by that person; and yet I did lawful thing" in endeavouring to defend myself.—*Ib.* 690.

The Law will not excuse a person charged *ex delicto* by reason of the absence from his mind of any wrongful or malicious motive even a lunatic will be civilly answerable for his torts although wholly incapable of design.—*Ib.*

So, to an action brought for a bodily injury, caused by negligence or want of skill, the mere absence of a design to injure will not furnish ground of defence.—*B. C.* 690.

An *assault* may be committed without actual battery; an attempt or offer to beat another without touching him, as if one

lifts up his cane or his fist in a threatening manner at another, or strikes at but misses him,—“a threat of violence exhibiting an intention to assault, and a present ability to carry the threat into execution” will amount in law to an assault. So also, does a *battery* which includes an assault and is described as the unlawful beating of another—the least touching of another’s person, wilfully or in anger; for “the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it—every man’s person being sacred, and no other having a right to meddle with it in any the slightest manner.” An assault, however, must be an act done against the will of the party assaulted; it would be “a manifest contradiction in terms to say, that the defendant assaulted the plaintiff *by his permission*.” An act *prima facie* amounting even to battery is, moreover, in some cases, “justifiable or lawful, as where one who hath authority, a parent or master, gives moderate correction to his child, his scholar, or his apprentice. So also on the principle of self-defence; for if one strikes me first, or even only assaults me, I may strike in my own defence, and if sued for it may plead *son assault demesne*, or that it was the plaintiff’s own original assault that occasioned it. So likewise in defence of my goods or possession; if a man endeavours to deprive me of them, I may justify laying hands upon him to prevent him, and, in case he persists with violence, proceed to beat him away.” There is, however, a manifest distinction between endeavouring to turn a man out of a house or close, into which he has previously entered quietly, and resisting a forcible attempt to enter; in the first-mentioned of these cases a request being necessary; whereas, in the latter, it is not. Again, the captain of a vessel conveying passengers may justify an assault committed for the preservation and maintenance of due order and discipline on board.—*B. C.* 691—693.

Besides an assault or battery, other torts to the person might be specified—remediable in trespass or in case, according as they are direct or consequential.—*Id.* 693.

206. In cases of torts three several states of facts may present themselves raising difficulty: (1st,) where the plaintiff has, by his own negligence or misconduct, contributed to cause the injury sustained; (2ndly,) where the defendant acted by his agent or

relation of master and servant, or employer and employed, existed, as between the plaintiff and defendant. To each of the classes of cases here suggested, some few remarks, which will be found to have a wide application in connection with torts generally, shall be directed.—*Ib.* 694.

With regard to the *first*, the rule is that, "although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong," and will be held in law—to have disintituled himself to complain.—*Ib.*

If the plaintiff voluntarily incurred danger so great that no sensible man would have incurred it, he will sue in vain for compensation.—*Ib.* 695.

For an accident which happened entirely without default on the part of the defendant, or blame imputable to him, he will not be responsible; the onus, however, of establishing this defence will be cast upon the defendant, where the facts are such as raise a *prima facie* case against him.—*Ib.*

As regards the *second* the rule is that the party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill, or want of care, of the person employed.—*B. C.* 696.

The above principle applies not only to domestic servants who may have the care of carriages, horses, and other things in the employ of the family, but "extends to other servants whom the master or owner selects and appoints to do any work, or superintend any business, although such servants be not in the immediate employ or under the superintendence of the master.*"—*Ib.* 697.

* Thus, "if a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew; the crew thus become appointed by the owner, and are his servants, for the management and government of the ship; and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself."—*B. C.* 697.

When he who does the wrongful act, either in person or by his servant, exercises an *independent employment*, his immediate superior will not be liable.—*Ib.* 701.

Although it is established that, if the owner of a carriage hires horses of a stable-keeper, who provides a driver, through whose negligence an injury is done, the driver must in general be considered as the servant of the stable-keeper or job-master,—the conclusion of law will, nevertheless, be different if there be special circumstances in the case shewing an assent, either express or implied, to the tortious act complained of by the party hiring the horses, or shewing that the individual whom it is sought to charge, had control over the servant whose act caused damage.—*Ib.* 703.

Where the injury in question was committed by the defendant's servant *wilfully*, whilst not employed in the master's service, and whilst not acting within the scope of his authority, a remedy cannot be had against the master—the servant only will be liable; as if, for instance, a servant authorized merely to detrain cattle damage feasant, drives cattle from the highway into his master's close, and there distrains them; or if he wantonly, and in order to effect some purpose of his own, strikes the plaintiff's horses, and thereby causes an accident.—*B. C.* 703.

Where one employs another to do an act which may be done in a lawful manner, and the latter, in doing it, unnecessarily commits a public nuisance, whereby injury results to a third person, the employer will not be responsible for such injury. If, however, A. employs B., a contractor, to do an unlawful act—ex. gr. to erect a nuisance in the public highway—which B. does by his work-people and servants, A. will be answerable in an action of tort for damage thence resulting to a third party.—*Ib.* 704—5.

If a landlord lets premises not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are so used or not, the landlord cannot be made responsible for the acts of the tenant, and he would not be liable if he had taken an obligation from the tenant not to use them so as to create a nuisance, even without reserving a right to enter and abate a nuisance if created.—*Ib.* 705.

trespass by the command or encouragement of his master, the master shall be guilty of it, though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful" so, also, "he that receiveth a trespasser, and agreeth to a trespass after it be done, is no trespasser, *unless the trespass was done to his use or for his benefit*; and then his agreement subsequent amounteth to a commandment." The main question in regard to liability by ratification will, accordingly, be this—was the tortious act, alledged to have been ratified, originally intended to be done to the use or for the benefit of the party who is said to have subsequently ratified it? If so, the party ratifying the antecedent act will be liable in respect of it; ex. gr., a corporation may thus become liable for an assault committed by their servant.—*Ib.* 707.

The doctrine of ratification is, of more difficult application in reference to torts than in reference to contracts (*B. C.* 707), which has been stated thus—

1) If A. commit a trespass, whether to the person or to property, professing at the time to act on behalf of B., though without authority from him, and B. afterwards knowingly ratify the trespass, B. may thus be rendered liable for it.—*Ib.* 713.

2) If A. does a tortious act, either on behalf of himself or as agent for B., and C., with whom A. has had no previous communication in regard to it, afterwards ratifies or adopts the act, C. will not, by so ratifying or adopting it, incur liability *ex delicto* in respect of it.—*Ib.*

3) One who adopts and ratifies an act done in his name or on his behalf, though without previous authority from him, may thereby enable himself to take advantage of the act done, provided he could himself lawfully have done it at the time when in fact it was performed.—*Ib.*

Thirdly the principle, upon which a master is in general liable to answer for accidents resulting from the negligence or unskilfulness of his servant, clearly does not apply to protect the servant, guilty of such negligence or want of skill against the claim of a third party who has been injured thereby. Nor, if the servant by his own unskilfulness sustain injury, can he claim damages from his master, upon an allegation that his own negligence was in point of law the negligence of his master. Where, moreover, several servants possessed of competent or reasonable care and

skill are employed by the same master, and injury results to one of them from the negligence of another fellow-servant, the master is not in general responsible.—*Ib.*

Torts to the health and comfort of individuals.

2) Injuries affecting the health of an individual, civilly cognisable by Courts of law, may be committed in various ways, ex. gr.—Where, by any unwholesome practices of another, a man sustains any apparent damage in his vigour or constitution. As by selling him bad provisions or wine; by the exercise of a noisome trade which infects the air in his neighbourhood; or by the neglect or unskilful management of his physician, surgeon, or apothecary. For it hath been solemnly resolved, that mala praxis is a great misdemeanor and offence at common law, whether it be for curiosity and experiment or by neglect; because it breaks the trust which the party had placed in his physician and tends to the patient's destruction.—*B. C.* 718.

207. In the next place, as regards *nuisance* calculated injuriously to affect the health or comfort of individuals,—the distinction between a *public* and *private* nuisance must here carefully be kept in view,—the mode of procedure for the abatement of the former being different from that available to an individual in respect of the latter.—*Ib.* 719.

208. To constitute the public nuisance, the thing complained of must be “such as in its nature or its consequences is a nuisance—an injury or a damage to persons who come within the sphere of its operation, though it may be so in a greater degree to some, than it is to others. For example: if, during the operation of a manufactory, volumes of noxious smoke or of poisonous effluvia are emitted; to persons who are at all within the reach of these operations, a nuisance, in the popular sense of the term is committed; although to those who are nearer to the manufactory in question the nuisance and inconvenience caused by it may be greater than it is to those who are more remote from it. So the stopping of the King's highway is a nuisance to all who may have occasion to travel upon that highway; it may be a much greater nuisance to a person who has to travel along it every day than it is to an individual who has to travel along it only once a year; but it is more or less a nuisance to every one who has occasion to use it—it is a ‘public’ nuisance.—*Ib.* 719—20.

209. If, however, the thing complained of is such that it is a nuisance to those who are more immediately within the sphere of its operation, but is no nuisance or inconvenience whatever, or is even advantageous or pleasurable to those who are more removed from it, there the matter in question does not properly come within the meaning of the term, 'public' nuisance. Thus, a peal of bells may be an intolerable nuisance to one who lives very close to them, whilst to a person who resides at a distance from them the sound thereby produced may be pleasurable.—*B. C.* 720.

210. Now in the case of a *public* nuisance the remedy at law is by indictment, the remedy in equity is by information at the suit of the Attorney-General. In the case of a *private* nuisance, the remedy at law is by action; the remedy in equity is by bill. Where, indeed, that which is a public nuisance is also a private nuisance to an individual by inflicting on him some special or particular damage, the individual thus specially aggrieved may have his private remedy at law by action or in equity by bill.—*Ib.* 721.

211. An action for negligent treatment of a patient is sustainable upon this principle, that every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not, indeed, if he be a surgeon undertake that he will perform a cure, nor does he undertake to use the *highest possible* degree of skill; but he undertakes to bring a fair reasonable, and competent degree of skill to the treatment of his patient; and it will be for the jury, in any given case involving a charge of negligence, to say whether the injury complained of really was occasioned by the want of such skill in the defendant.—*Ib.* 722.

Torts to personal liberty.

212. Torts affecting personal liberty are False Imprisonment and Malicious arrest.—*Ib.* 723.

To constitute the injury of *false imprisonment*, there are two requisites, the detention of the person, and the unlawfulness of such detention. The confinement of the person, in any wise, is an imprisonment, which may even be evidenced by the forcibly detaining of another in the public street. False imprisonment consists in such confinement or detention without sufficient authority. As if A. is arrested on a criminal charge under warrant against B. or if a warrant for the apprehension of any one on such a charge directed to the constable of X., a parish in the country of

Y., be delivered for execution to a country constable of Y., and be executed by him. In either of these cases, the arrest effected under the warrant will be illegal, as unauthorised by it; and the party taking out the warrant, and delivering it to the constable, will be liable in trespass at suit of the individual arrested. So, the wrongful removal of a prisoner from one part of a prison to another, and his detention in the part to which he is so removed, will lay the foundation of an action of trespass and false imprisonment, in which even the Home Secretary may be liable, if it appear that the complainant was removed under a general order issued by such Secretary for the classification of the prisoners, which he had no legal authority to make.—*B. C. 723.*

213. An arrest and imprisonment may, however, be justified in certain cases by reference to acknowledged principles of law, or as having been effected under the sanction of judicial process.—*II.*

214. For instance, it is laid down, that a private person is justified in arresting any of the Queen's subjects if there be a breach of the peace actually continuing, or if he has reasonable ground to believe that a breach of the peace which has been committed will be renewed. It is also clear that any bystander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it; further—he may arrest the affrayers and detain them until their heat be over, and then deliver them to a constable: the principle of these decisions being, that, "for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shews that the public peace is likely to be endangered by his acts."—*Ib. 724—5.*

215. So, if a person comes into a house, or is in it, and makes a noise and disturbs the peace of the family, although no assault has been committed, the master of the house may turn him out, or call a policeman to do so. And if a man stations himself opposite to another's house, making a disturbance, exciting others to disturbance and riot, and obstructing the public way, these are facts which may well amount to such a breach of the peace as justifies an arrest.—*B. C. 725.*

216. It seems clearly established, however, that a private individual, who has seen an affray committed, is not justified in giving in charge to a constable, who has not, after the affray has

entirely ceased, after the offenders have quitted the place where it was committed, and when there is no danger of his renewal. Inasmuch, moreover, as the power of a constable, at common law, to take into his custody, upon the information of a private person under such circumstances must be correlative with that of the latter to give in charge, it follows that the constable will not be justified in taking a party designated as the offender into custody upon such information.—*Ib.*

217. A private individual, also, being present at the time when a felony is committed, may legally and ought to arrest or aid in arresting the offender. He may even break into a private house in order to prevent the commission of a felony. Or, a felony having been committed, he may give in charge the guilty party to a policeman. Mere suspicion that a particular person has committed a misdemeanour will not, however, justify the giving him into custody without a warrant.—*Ib.* 726.

218. Again: an arrest and imprisonment may be justified on this ground, that a felony *having been committed* there was *reasonable and probable cause* to suspect and accuse the plaintiff of it, and therefore to arrest and imprison him with a view to charging him with the offence. In any such case it is laid down, that to justify depriving a person of his liberty, the party so doing must allege such a ground of suspicion as the Court can see to be reasonable. It would not, however, be correct to say that all the evidence must be set out in the plea; it is enough to shew facts sufficient to ground a suspicion of the guilt of the party charged in the mind of a reasonable man. It will then be for the jury to say whether the facts pleaded are proved, and for the Judge to determine whether or not they amount to reasonable and probable cause—not for suspecting, but—for imprisoning the plaintiff.—*B. C.* 726—7.

219. A plea justifying the breaking and entering a house and arresting the plaintiff without warrant on suspicion of felony, ought distinctly to shew not only that there was reason to believe that the suspected person was there, but also that the defendant entered for the purpose of apprehending him.—*Ib.* 727.

220. Although, however, it is clear that a private individual cannot arrest upon bare suspicion, a constable may do so. There is this distinction between the two parties just named: in order

to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorised to detain the party suspected until inquiry can be made by the proper authorities.—*Ib.*

221. Where two or more persons have so conducted themselves as to be liable to be jointly sued for trespass and false imprisonment, the damages must be assessed against all jointly, each of the defendants being responsible for the injury sustained by their common act. "Where two persons," it has been said, "have a joint purpose, and thereby make themselves joint trespassers, and the one beats violently, and the other a little, the real injury is the aggregate of the injury received from both. So, if motive be taken into consideration, the motive of A. may be most aggravated, and the motive of B. most mitigated, then the damages must be regulated accordingly."—*Ib.* 737.

222. "Malice," says Lord Campbell, C. J., "in the legal acceptance of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another." Malice is of two kinds—malice in law, and malice in fact. Malice *in law* is where a wrongful act is done intentionally, without just cause or excuse. If, for instance, I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally*, and without just cause or excuse. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, the law considers it as done of malice, because it is wrongful and intentional; it equally works an injury, whether I *meant* to produce an injury or not; and if I had no legal excuse for the slander, why should there not be a remedy against me for the injury which it produces? Such being legal "malice" it follows that some acts are in law always malicious, without any proof being given of personal ill-will or ill-feeling.—*B. C.* 738—9.

223. 'Malice *in fact*' is said to be of two kinds, viz. personal malice against the individual, and that sort of general disregard of the right consideration due to all mankind which, indeed, *may* not be previously directed against any one, but is nevertheless productive of injury to the complainant. This seems very nearly equivalent to saying that "malice in fact may be proved to have existed in one or other of two ways—either by direct evidence,

as of expressions used, of declarations made, or of conduct generally—evinced enmity towards a particular individual; or, again it may be shewn by proof of some act from which a jury would, be held justified in *inferring* a malicious motive; and the act relied upon as evidence of malice may possibly be one not aimed at the particular individual who has suffered by it.—*Ib.* 739.

224. The remedy for a malicious injury is by action on the case, to support which there must be both injury, in the strict sense of the word, (that is, a wrong done), and loss resulting from that injury; the injury or wrong done must be the act of the defendant, and the loss must be a direct and natural, not a remote and indirect, consequence of the defendant's act. Unless, indeed, there be a loss thus directly and proximately connected with the act, the mere *intention*, or even the *endeavour*, to produce it will not found an action. A man's *motives* will not make wrongful an act which in itself is not wrongful. An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.—*B. C.* 739—40.

225. To put in force the process of the law maliciously, and without any reasonable or probable cause, is wrongful; and if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which will lay the foundation of an action on the case. A malicious arrest may be on the *mesne* or on final process; but, in order to maintain an action for this wrongful act, the plaintiff must show absence of probable cause or reason for the arrest—malice in instituting the former action—the fact of the arrest by the defendant, and that the former suit or proceeding has been determined in the plaintiff's favour; for till then it cannot appear whether the proceeding in question was groundless or not.—*Ib.* 740—41.

226. In an action for a malicious arrest under a statute, it is essential that the plaintiff should allege falsehood or fraud in obtaining the original order, should shew that the defendant has in some way misrepresented the facts, or imposed upon the Judge in his representation of them. There is no doubt, indeed, that, if a person *truly* states certain facts to a Judge, and the Judge thereupon does an act which is erroneous, and which the law will not justify, the party who made the statement is not liable, because in that case the grievance complained of arises not from the false statement of the party, but from a mistake of the Judge; but this is not so where the statement which put the Court in motion is

maliciously false. As arrest on mesne process is now comparatively rare, so the action for a malicious arrest on mesne process is at the present day of much less frequent occurrence than formerly.—*Ib.* 741—2.

227. Process of execution on a judgment seeking to obtain satisfaction for the sum recovered is of course *prima facie* lawful and the judgment creditor cannot even be rendered liable to an action, the debtor merely alleging and proving that the judgment had been partly satisfied, and that execution was sued out for a larger sum than remained due upon the judgment. Without malice and the warrant of reasonable or probable cause, the only remedy for a judgment debtor thus aggrieved is to apply to the Court or a Judge that he may be discharged and that satisfaction may be entered up on payment of the balance justly due under the judgment. Where, however, the person of the debtor or his goods have been taken in execution for a larger sum than remained due on the judgment—this having been done by the creditor *maliciously and without reasonable or probable cause*—i. e., the creditor well knowing that the sum for which execution has been sued out is excessive and his motive being to oppress and injure the debtor—an action on the case will lie for this malicious injury ; for here are present *damnum et injuria*, giving a claim to redress and compensation.—*B. C.* 742—3.

Torts to the Reputation.

228. Torts to the Reputation are Malicious prosecution, Libel and Slander. The essential ground of the action for a malicious prosecution is, that a legal prosecution was carried on *without a probable cause*, whence damage has ensued to the plaintiff. This allegation of the want of probable cause, “must be substantively and expressly proved, and cannot be implied. From the want of probable cause, malice may be, and most commonly is implied ; the knowledge of the defendant is also implied. From the most express malice, the want of probable cause cannot be implied. A man from a malicious motive may take up a prosecution for real guilt, or he may from circumstances which he really believes proceed upon apparent guilt ; and in neither case is he liable to this kind of action.” In order to support such an action, there must be a concurrence of malice in the defendant, and want of probable cause. Malice alone is not sufficient, because a person actuated by the plainest malice may nevertheless have a justifiable reason for prosecution. On the other hand, the substantiating the accu-

sation is not essential to exonerate the accuser from liability to an action, for he may have had good reason to make the charge, and yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of producing adequate legal proof. The law, therefore, only renders him responsible *where malice is combined with want of probable cause*. What shall amount to such a combination of malice and want of probable cause, is so much a matter of fact in each individual case, as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a reasonable man, that the accuser had no ground for proceeding, but his desire to injure the accused."—*B. C.* 745.

229. In an action for a malicious prosecution the reasonable-ness and probability of the ground for prosecution may depend, not merely upon the proof of certain facts, but upon the inquiry whether other facts which furnished an answer to prosecution were known to the defendant at the time it was instituted. It may depend upon the inquiry, whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not, or upon this question, whether, from the conduct of the defendant himself, the jury will infer that he was conscious he had no reasonable or probable cause. In any such case, however, the knowledge the belief, and the conduct of the defendant are for the consideration of the jury, to whom nothing is left but the truth of the facts proved and the justness of the inferences to be drawn from them; the law being laid down by the Judge, that, according as the facts are found by the jury to be proved or not proved, and the inferences warranted or not there was reasonable and probable ground for the prosecution, or the reverse.—*Ib.* 746—6. (See also *II. H. C. R. p.* 291.)

Libel.

230. A *libel* has been defined to be a malicious defamation expressed in print, writing, or by signs, tending to injure the reputation of another, and exposing him to public hatred, contempt, or ridicule. It is not, however, the mere writing of libellous matter which is actionable, there must be a *publication* of the libel in order to entitle the party aggrieved by it to a civil remedy.—*B. C.* 747—8.

231. The alleged libellous matter must be *false*; its truth may be specially pleaded in answer to the action. Further, the

matter complained of must be shewn to have been *maliciously* published.—*Ib.* 748.

232. In an action for libel either party may indeed, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of the defamatory matter; for the spirit and intention of the party publishing a libel are fit to be considered by a jury in estimating the injury done to the plaintiff.—*Ib.* 749.

Where the circumstances under which a particular communication is made are consistent with either the presence or absence of malice, it will be incumbent on the plaintiff to prove malice, in order that he may successfully sue for libel; and where the circumstances do not present any justifiable occasion for writing and publishing the defamatory matter, the communication is said not to be privileged.—*Ib.* 752—3.

A communication will be privileged when made *bonâ fide* by the party charged, in the performance of some public or private duty, whether legal or moral; or in the conduct of his own affairs and with a fair and reasonable hope of protecting his own interest in a matter where it is concerned.—*Ib.* 753.

233. *Publication* of a libel must be proved in order that an action for it may be sustainable. A libel may be 'published' in various ways, ex. gr., by reading it aloud, by selling it or distributing it gratis, by sending it by post or otherwise to any third person. A paper containing libellous matter may, moreover, be published without any actual manifestation of its contents, in like manner as an individual publishes an award without reading it to the parties who have submitted to his arbitration, or a will without declaring its contents to those to whom he makes the publication. In the case of a libel, 'publication,' it has been said, is "nothing more than doing the last act for the accomplishment of the mischief intended by it." The moment a man delivers a libel from his hands, and ceases to have control over it, there is an end of his *locus pœnitentiæ*; the *injuria* is complete, and the libeller may be called upon to answer for his act.—*B. C.* 758—9.

234. The making of a libel known, then, to any individual other than the party libelled, amounts indisputably in law to a publishing of the libel. Even the addressing to a wife a letter containing libellous matter reflecting on her husband, is a publication. And in an action for libel, it is no justification that the

libellous matter was previously published by a third person, and that the defendant, at the time of his publication of it, disclosed the name of that person, and believed all the statements contained in the libel to be true.—*Ib.* 759.

Slander -

235. The declaration in an action for slander is this form :— It alleges “That the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say [‘he is a thief’].” The special damage, if any, should then be stated with such reasonable particularity as to give notice to the defendant of the peculiar injury complained of; for instance, ‘whereby the plaintiff lost his situation as gamekeeper, in the employ of A.’—*Ib.* 761—2.

236. There is one rather peculiar kind of slander—viz. slander of title to land or other realty. Slander of title signifies a statement of something tending to cut down the extent of title to some estate vested in the plaintiff; and this is actionable only when is false and malicious, *i. e.* done with intent to injure the plaintiff. Suppose, for instance, that one having an infirm title to property is about to sell it, or to make it the subject of a settlement, and that another, moved by spite and malice, discloses what he believes to be a defect in the title, which information afterwards turns out to be untrue; suppose, further, that injury thence results to the proposed vendor; in such a case an action will lie at suit of this latter party, the statement being false and malicious, and injurious to him; but under the circumstances just supposed, both the falsehood of the statement made and express malice on the part of the defendant must be shewn, or there will be no case for the jury.—*B. C.* 763—4.

Torts to real property.

237. The ordinary injuries or torts to real property, is constituted by the wrongful detention or withholding of land from its lawful owner, by possession and occupancy adverse to his rights. For this injury the remedy is by *ejectment*, which is the specific form of action prescribed by law for recovering the possession of land, and lies at suit of the claimant against the wrongful occupier of it.—*Ib.* 766—7.

Ejectment is brought rather with a view to recovering the possession of land than in assertion of a title to it which shall be

* Vide S. D. page 45 of 1862.

altogether indefensible. If A. claims land of which B. is in possession B. is in law to be considered as owner of the land until the contrary be proved. So that A. will necessarily have to recover possession, if at all, by the strength of his own, and not by the weakness of B.'s title. Should A. succeed in doing so, and should it happen that B. or any other person afterwards becomes clothed with a better title than A., a second action may be brought, and A. may be ejected from the land.—*Ib.* 767.

238. Where the relation of landlord and tenant exists between the claimant of land and the party in possession it will not be necessary for the landlord claiming the land to prove his title to it, by virtue of the well-known rule, that a tenant shall not be allowed to dispute his landlord's title, *i. e.* shall not be permitted to dispute the *original right* of him by whom he has himself been admitted into possession. If B., claiming under A. lets land to C. for a year and dies, and A. afterwards brings ejectment against C., C. may in some cases be estopped from disputing A.'s title paramount to the land. A tenant, however, may show that his landlord's title has ceased and determined subsequently to his own entry into the land and attornment to the plaintiff. And, in a word, as between landlord and tenant the right to maintain ejectment will depend upon this question, whether the landlord or the tenant was at the particular date specified in the declaration entitled to the possession of the land for which the action was brought—a question which will usually have to be determined by reference to the terms of the demise, or to the covenants and conditions (if any) contained in the lease between the parties.—*B. C.* 769.

239. Trespass to realty consists in a wrongful and unwarrantable entry upon the soil or *land* of another which the law entitles a trespass by '*breaking his close*;' "Every man's land," says Blackstone, "is in the eye of the law enclosed and set apart from his neighbour's and that, either by a visible and material fence, as one field is divided from another by a hedge, or by an ideal invisible boundary existing only in the contemplation of law, as when one man's land adjoins to another's in the same field." Any entry upon, or breach of, a man's close if unauthorised by him, and unjustified by law, carries necessarily along with it *some* damage or other. So that proof of the alleged trespass will, without any proof of damage sustained, entitle the plaintiff to a verdict; and the reason of this has been well explained as follows: For the vindication of every right there is a remedy; when, there-

fore, there has been a violation of a right, the person injured is entitled to an action, and, consequently, to at least nominal damages.—*Ib.* 777—8.

240. The action of trespass is founded upon actual possession by the plaintiff, i. e. possession by himself, or by his servant or agent. Should he be out of possession, as, if he has demised it to another, trespass for an entry upon such land will clearly not lie at his suit, the tenant in possession being here the party aggrieved, and being therefore entitled to complain by action at law.—*Ib.* 779.

241. "Where," says Blackstone, "a man misdemeans himself, or makes an ill use of the authority with which the law intrusts him, he shall be accounted a trespasser *ab initio* ; as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night contrary to the inclinations of the owner, this wrongful act shall effect and have relation back even to his first entry, and make the whole a trespass. But a bare non-feasance, as not paying for the wine he calls for, will not make him a trespasser, for this is only a breach of contract for which the taverner shall have an action of debt or assumpsit against him."—*B. C.* 787—8.

Nuisance to reality, &c.

242. A private 'nuisance' has been defined to be "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another." "If," says Blackstone, "one erects a smelting house for lead so near the land of another that the vapour and smoke kills his corn and grass and damages his cattle therein, this is held to be a nuisance ; and by consequence it follows, that if one does any other act, in itself lawful, which yet, being done in that place, necessarily tends to the damages of another's property it is a nuisance ; for it is incumbent on him to find some other place to do that act where it will be less offensive." So also, if my neighbour ought to scour a ditch or cleanse and keep in repair a drain and neglects to do so, whereby my land is overflowed and my goods are damaged, this is an actionable nuisance.—*Ib.* 789-90.

243. Likewise, to erect a house or other building so near to mine that it obstructs my ancient lights and windows, is a nuisance of a similar nature.—*Ib.* 790. Nuisance may also consist in the wrongful diversion or abstraction of water from a stream or watercourse.—*Ib.* 796.

The word 'land,' says Sir E. Coke, in legal contemplation "comprehendeth any ground, soil, or earth whatsoever, as meadows, pastures, woods, moors, waters, marshes, furzes, and health;" upon which passage Blackstone observes as follows:—"it is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism, but such is the language of the law; and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of 'water' only, either by calculating its capacity, as for so many cubical yards, or by superficial measure, for twenty acres of water, or by general description, as for a pond, a watercourse, or a rivulet; but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water*. For water is a moveable wandering thing, and must of necessity continue common by the law of nature. So that I can only have a temporary, transient usufructuary property therein; wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land which that water covers is permanent, fixed, and immoveable, and therefore in this I may have certain substantial property of which the law will take notice."—*B. C.* 796.

244. Flowing water, it has been observed, as well as light and air, is in one sense *public juris*. It is a boon from Providence to all, differing from the other elements, however, in its mode of enjoyment. Light and air are diffused in *all* directions, flowing water in *some*. When property was established, each one had the right to enjoy the light and air diffused over and the water flowing through the portion of soil belonging to him; the property in the water itself was not in the proprietor of the land through which it passed, but only the use of it, as it passed along, for the enjoyment of his property, and as incidental to it; *aqua currit et debet currere* is the language of the law; and whether the right to natural streams be *ex jure naturae*, or by acquiescence and the presumed grant of neighbours (the former of which opinions seems now to be established as correct,) the rule is, that, "*primâ facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, *but there is no property in the water*. Every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water

which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above." Subject to such restrictions, however, each riparian owner is entitled to the usufruct of the stream for all reasonable purposes—ex. gr. to drink, to water his cattle, or to turn his mill—and each such owner has a remedy for the infringement of his right. If the stream be diverted by altering its course, or cutting down its banks, or if the water be abstracted from it for unauthorised purposes, the owner will have his right of action on the case against the wrongdoer.—*B. C.* 797—798.

245. The right of an individual to an *artificial* watercourse, as against the party creating it, will depend, however, upon the character of the watercourse and the circumstances under which it was created. For the diversion of such a watercourse no action will lie, where, from the nature of the case, the enjoyment of it obviously depended upon temporary circumstances, and was not of a permanent character, and where the interruption, was by the party who stood in the situation of the grantor.—*Ib.* 798.

Torts to personal property.

246. Torts to personal property may be classified into, 1st, Torts to property in possession of the owner. 2nd, Torts to property out of the owner's possession.

First. A tort to personality in the possession of the owner may be constituted by the wrongful deprivation of that possession, or by an abuse of, or a damage done to, the chattel whilst in his possession. A wrongful deprivation of possession may be by taking illegal in its inception; or by an illegal detention of that, whereof the original possession was legally acquired.—*Ib.* 801.

Second. Torts to property out of the owner's possession, may occur under many dissimilar circumstances, as, where the chattel wrongfully seized or injured is in the custody of the law or under bailment to another.—*Ib.* 809.

247. A bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract; express or implied to confirm to the object or purpose of the trust. (*B. C.* 810.) Bailments are classified into three heads.—viz.

(1.) Bailment in which the trust is exclusively for the benefit of the bailor, as a deposit or naked bailment of goods to be kept for the bailor gratuitously, and returned when he shall require it.

In this case the bailee is bound merely to use a slight degree of diligence respecting the thing bailed, and is liable for gross negligence only, the reason being that the bailee is to receive nothing for his services.—*B. C.* §11.

(2.) Bailment for exclusive benefit of the bailee, in which the thing bailed is usually to be restored in specie. This bailment is called a *Loan*, and the degree of diligence here required from the bailee is very much, if not precisely, that required from the gratuitous bailee possessing skill, who, as above stated is bound to exercise the skill which he possesses. A much greater degree of diligence will therefore be expected from him, than from one who is a mere gratuitous bailee for the benefit of the bailor.—*Ib.* 814.

(3) Bailment for benefit of both parties is the pledging or pawning of a Chattel, or a bailment for reward or compensation. A pledge or pawn is a bailment of goods to a creditor, as security for some debt or engagement; and the pawnee is bound to use ordinary diligence in the care and safeguard of the pawn, so that if the thing pawned be lost notwithstanding the exercise of such diligence, the pawnee may still resort to the pawnor for the amount of the debt secured by the pawn. If the thing pawned were a jewel, the pawnor might use it, but then he must do it at his peril; for whereas if he keeps them locked up in his cabinet, and if the cabinet should be broken open, and the jewel taken from thence, he would be excused. If he wears it abroad, and is there robbed of it, he will be answerable; and the reason is, because the pawn is in the nature of a deposit and as such is not liable to be used.—*Ib.* 817.

248 Torts by third persons may occur to chattels under bailment, viz. when under custody of an innkeeper (*B. C.* 840.) Boarding House keeper (*Ib.* 821.) and Land carriers (*Ib.* 822.) and out of the possession of the owner. When goods entrusted to them are lost, nothing will excuse them except the Act of God or of the King's enemies.—*Norton Topic on J. P. P.* 454.

The "Act of God" being understood to signify inevitable accident, and by the "King's enemies" being meant public enemies with whom the nation is at open war.—*Ib.* 824.

249. Action may be maintainable in respect of such wrongful act, either by the general owner of the goods in question, or by the special owner entrusted therewith. Thus, a carrier may maintain trover against a stranger who takes the good out of his possession;

and so may a factor, a warehouse keeper or an auctioneer; and a trustee, pawnee, licensee, or gratuitous bailee, may respectively sue for a tort to the Chattel held in trust or on bailment.—*B. C.* 837.

Torts to relative rights.

250. Torts not directly affecting the personal property may occur when wrongs are done to *relative rights* of individuals.—*Ib.* 841.

251. Relative rights are such as are incident to persons considered as members of society and connected to each other by various ties and relations, as Husband and Wife, Parent and Child, Guardian and Ward, Master and Servant.—*Ib.* 841.

(1) Husband and Wife. By English Law the husband is allowed a civil remedy for the abduction of the wife; for an assault committed upon her, and for criminal conversation with her.—*Ib.* 846.

(2) Parent and Children. For seduction of his child, and for the loss of service of the daughter, a parent is allowed a civil remedy.—*Ib.*

(3) Precisely on the same footing with the right of action for seduction stands that brought by a parent for a personal injury to his child, or by a master for the battery of his servant, or in procuring the servant to depart from the Masters's service, or by harbouring and keeping the servant.—*Ib.* 849.

CHAPTER IV.

MEASURE OF DAMAGES.

In actions of Contracts.

252. In an action for breach of contract, the intention or motive of the party charged cannot be inquired into, and indeed will be irrelevant to the issue. In such an action the main questions for determination will be, What was the contract? Was it broken by the defendant? If the terms of the contract be ascertained, and its breach be proved, the only other inquiry will be as to the *amount of damages to be awarded*; and, in estimating these damages, the motive or intention of the defendant will be immaterial.—*B. C.* 630.

253. Where a vendor covenants that he has good right to convey, immediately on the execution of the conveyance, if he has not such right, his covenant is broken, and an action may instantly be commenced by the covenantee, without waiting for a disturbance of his possession; for an eviction does not constitute the breach of the covenant in question, but is consequential damage arising therefrom.—*Ib.* 631.

254. Where an agreement, good in law, stipulates for the payment on a day named of a specific and ascertained sum by one of the parties to it, the *prima facie* measure of damages will be the precise sum thus stipulated to be paid. Where, in other words, an action is brought for the recovery of a *fixed* pecuniary demand, founded upon contract, and the plaintiffs' claim is established, unreduced by any set-off or by proof of a partial failure of consideration, the true measure of damages, as determined by the act of the parties, will be that sum which the defendant has undertaken or contracted to pay.—*Ib.* 631—2.

255. A being indebted to B. in the sum of 500*l.* for goods sold, gave B. a bill of 600*l.* drawn by himself to get discounted,

upon these terms : that B. should retain to his own use the sum of 100*l.* and the discount, and should pay over the balance to A. Here the measure of damages in an action by A.'s assignees against B. was held to be the amount of the bill *minus* the 100*l.* and discount.—*B. C.* 634.

Where, however, parties agree that a specific sum shall be payable by way of *penalty* for breach of contract, our Courts will apply equitable principles in the assessment of damages ; not, indeed, allowing them to exceed the sum thus stipulated, but requiring evidence to be given for the purpose of fixing their precise amount, and enabling the jury to award it accordingly. *Ib.* 635.

256. The distinction between penalty and liquidated damages in this—

Where parties enter into a contract containing various clauses and stipulations, and also that “if either of the parties should neglect or refuse to fulfil the agreement, such party should pay to the other the sum of 1000 Rupees” this last clause was held *penalty*.—*Ib.* 634.

Liquidated damage is where the parties have agreed that in case one party shall do a stipulated act or omit to do it, the other party shall receive a certain sum as the just, appropriate and conventional amount of the damages sustained by such act or omission. In case of this sort, Courts of Equity will not interfere to grant relief but will deem the parties entitled to fix their own measures of damages, provided they do not assume the character of gross extravagance, or of wanton and unreasonable disproportion to the nature and extent of the injury.—*S. M.* § 350.

So in a case the defendants bound themselves to deliver Jag-gery to plaintiff by a given day, in consideration of an advance of 800 Rs. and on failure were to pay a penalty of 50 per cent on the advance. This was held to be in fact liquidated damages.—*S. D.* 1861 *p.* 134.

Where the contracting parties have not by mutual stipulations precisely indicated the amount of damages to be recoverable by either, in the event of a breach of contract, such damages will have to be assessed according to the general rules of law :—“that, where a person makes a contract and breaks it, he must pay the whole damage sustained” ;—“that, where a party sustains a loss by

reason of breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed."—*B. C.* 637.

Thus, A., having recovered a judgment for 281*l.* 3*s.* 6*d.* against B., agreed with C. to forbear to sue out execution upon the judgment until a future day, in consideration whereof C. undertook that he would on or before that day erect a substantial dwelling-house, and cause a lease of the same to be granted to A., such lease when granted to be in satisfaction of the judgment. In an action by A. against C. for breach of this undertaking, the measure of damages was held to be the value of that (*viz.* the lease of the house in question) which the defendant had promised to give, in consideration of the plaintiff's forbearance.—*Ib.*

Contracts for the sale of chattels or personal property may be broken either by the vendor's neglect to deliver the goods contracted for ; or by the vendee refusing to accept them, or to pay their stipulated price ; or by the article delivered proving different from what it was represented to be at the time of sale.—*Ib.* 638.

In such case, if there be no element of fraud, no attempt at overreaching in the case, the very terms of the given contract will, in general suggest the proper measure of damages to be applied on its breach. Thus, in an action at suit of the vendee for non-delivery of goods, stock, or shares (purchased but not paid for) pursuant to contract, the general rule is, that the measure of damages is the difference between the contract price and the market price of the subject-matter of the contract at the time of the breach ; so that, if the price of the goods, stock, or shares contracted for, has not varied, the purchaser will be entitled to nominal damages only for their non-delivery.—*Ib.* 638—9.

Further, where the purchaser of goods resells them before the time fixed for their delivery, he will be restricted by the above specified measure of damages, *viz.* the difference between the contract price and the market price at the date of the breach of contract ; and he will not be entitled to recover the amount of the claim, if any, enforceable by his sub-vendee for breach of contract against himself ; because, immediately on receiving notice of the defendant's breach of contract, the plaintiff ought to have supplied himself with the article in question, in order to be able to deliver it to his buyer.—*B. C.* 639.

In an action at suit of the vendor of merchandise against the vendee for not accepting it, the measure of damages will similarly be determined by reference to the contract price and the market price at the time of refusing to accept the goods. A. contracted for the purchase of wheat, "to be delivered at Birmingham as soon as vessels could be obtained for the carriage thereof;" subsequently the market having fallen, A. gave notice to the seller that he would not accept the wheat, then being on its transit to Birmingham, if it were delivered. In action against A. for not accepting the wheat, the proper measure of damages was held to be the difference between the contract price and the market price on the day when the wheat was tendered to A. for acceptance at Birmingham, and was refused.—*Ib.* 640—1.

In certain cases proof of special facts on behalf of the plaintiff might vary the rule to be applied for assessment of his damages. "If" says *Erle*' J., on a recent occasion, "goods are not delivered or accepted according to contract, time and trouble as well as expense may be required either in getting other similar goods or finding another purchaser, and the damages ought to indemnify both for such time, trouble, and expense, and for the difference between the market price and the price contracted for." Most cases of contract, vary from each other, and whatever general rules there may be as to awarding damages, they must be modified by the particular cases to which they come to be applied.—*Ib.* 640.

Again,—in an action for breach of a contract to replace stock lent, the measure of damages is held to be the price of the stock on the day when it ought to have been replaced, or its price on the day of the trial, at the plaintiff's option. The true measure of damages in all these cases is that which will completely indemnify the plaintiff for the breach of the engagement. If the defendant neglect to replace the stock at the day appointed, and the stock afterwards rise in value, the plaintiff can only be indemnified by giving him the price of it at the time of the trial. And it is no answer, to say that the defendant may be prejudiced by the plaintiff's delaying to bring his action; for it is his own fault that he does not perform his engagement at the time; or he may replace it at any time afterwards, so as to avail himself of a rising market. So, in an action for not re-delivering mining shares, lent to the defendant upon a contract to return them on a given day, the true measure of damages will, if they have not been replaced, be the market price of the shares at the time of the trial.—*B. C.* 610—1.

The measure of damages in cases for the price of goods sold depend simply upon the evidence adduced.—*Ib.* 642.

Where an action was brought for the agreed price of a specific chattel sold *with a warranty*, or of work which was to be performed *according to contract*, it has been held competent for the defendant to shew how much less the subject-matter of the action is worth by reason of the breach of contract, and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account he must be considered as having received satisfaction or the breach of the contract declared upon, so as to be precluded from recovering in another action to that extent; but no more.—*Ib.* 642.

What, it may be asked, in the case of the breach of a covenant to repair, is the true measure of damages? Is it the amount which would be required to put the premises into repair? Is it the amount of injury done to the reversion by the premises being out of repair? Or, to speak more specifically, is it the loss which the landlord would sustain if he sold his reversion in the market? The latter of these methods of determining the damages would seem to be the most satisfactory and most true.—*Ib.* 644.

In the case of a wrongful dismissal, the servant or party dismissed may recover such damages as the jury think the loss of the situation has occasioned. If the plaintiff has obtained, or is likely to obtain, another situation, the damage ought, on that ground, to be proportionately less, or even nominal, regard being had to the real loss sustained. Considerable latitude seems, however, in cases of the kind before us, to be permitted to the jury.—*B. C.* 645.

Contracts for the sale of real estate are held to be made subject to the condition that the vendor has a good title; so that, when a person contracts to sell real property, there is an implied understanding, that, if (without fraud on his part) he fails to make out a good title, the only damages recoverable will be the expenses which the vendee may be put to in investigating the title. Nominal damages only are, in such case, recoverable by the vendee for the loss of his bargain.—*Ib.*

257. A person who had contracted for the purchase of an estate, but had not himself obtained a conveyance of it, sold it by auction, with a stipulation to make a good title by a day named. This he was unable to do, inasmuch as his vendor refused to convey,

and it was held, that the purchaser by auction might, beyond his expenses, recovered damages for the loss which he had sustained by not having the contract carried into effect.—*Ib.* 646.

258. Where a party has been let into possession of land under a contract of purchase which he then refuses to complete, and no conveyance is executed, the vendor cannot recover from him the whole amount of the purchase money, but only the damages actually sustained by his breach of contract.—*Ib.* 647.

259. It is necessary, in every case, to determine whether or not the damage, laid in the declaration, is sufficiently connected with the alleged injury to justify its recovery by action. "If", says Dr. Story, "an agent who is bound to render an account and pay over monies to his principal at a particular time, should omit so to do, whereby the principal should be unable to pay his debts or to fulfil his other contracts, and should stop payment and fail in business, or be injured in his general credit thereby, the agent would not be liable for such injury ; for it is but a remote or accidental consequence of the negligence. So, if an agent, having funds in his hands, should improperly neglect to ship goods by a particular ship according to the orders of his principal, and the ship should duly arrive, and, if the goods had been on board, the principal might, by future reshipments and speculations, have made great profits thereon, the agent will not be bound to pay for the loss of such possible profits, for it is a mere contingent damage, or an accidental mischief." And the same reasoning would apply to a case where, by the neglect of an agent to remit money, the principal has been prevented from engaging in a profitable speculation in some other business by his want of the funds.—*B. C.* 647—8.

260. It has been held, that, in an action for breach of warranty of a horse, the loss of a bargain for resale of the horse is not recoverable as special damage. Nor, in such an action, can the costs of improvidently defending an action, brought against the plaintiff by his sub-vendee for breach of warranty, be recovered. No person has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action which he cannot defend.—*Ib.* 652.

261. The general rule as to remoteness of damages has been stated that, under ordinary circumstances, loss recoverable for breach of contract must be such as would naturally, i. e., in a

great majority of similar cases, flow from the breach alleged ;— that, if there were special circumstances in the case, which would have made the loss complained of a reasonable and natural consequence of the breach, it must be shown that such special circumstances were communicated to or known by the defendants. —*Ib.* 653.

In actions of tort.

262. The damages recoverable in an action *ex delicto* are in general regarded by law as purely *compensatory*, although a wider latitude is allowed to the jury who may take into consideration the intention of the offending party, review all the circumstances of the case, and apportion the damages accordingly, thus to some extent causing the verdict to operate as a medium for punishment as well as compensation.—*B. C.* 630 & 850.

263. In trespass, for cutting into the plaintiff's close and carrying away his soil, the plaintiff is entitled, by way of compensation, to what the land was worth to him. In trover, the damages are ordinarily to be measured by the value of the thing converted ; though where the plaintiffs sued in trover for a bill of exchange for 1600*l.*, deposited by them with the defendant, and it appeared that the defendant had been guilty of a conversion of the bill, and had afterwards raised 800*l.* by discounting it, the plaintiffs were held entitled to a verdict for 1600*l.* ; for the defendant "converted the whole bill, and the plaintiffs are entitled to recover the value of the whole at the time of the conversion." —*Ib.* 850.

264. In an action against the sheriff for an escape, the damages should be assessed by reference to "the value of the custody of the debtor at the moment of the escape," although, if the plaintiff has done anything to aggravate the loss occasioned by the sheriff's neglect, or has prevented him from retaking the debtor the amount recoverable would be materially affected by such conduct. So, in an action against an attorney for negligence, damages should be awarded commensurate with the loss sustained.—*Ib.* 851.

265. It is, indeed, easy to suggest a state of facts giving rise to an action *ex delicto*, which would at once present the true measure of damages to be awarded to the complainant, and in which no ground for aggravated damages beyond such measure would exist. Thus, in case by a reversioner for injury to his reversion-

any freehold interest in land, the measure of damages would be ascertained by considering to what extent the land was lessened in value by the wrongful act of the defendant. In an action by a tenant against his landlord for selling goods under a lawful distress but without having them properly appraised, the measure of damages would be the real value of the goods sold, minus the rent due. And, generally, where an injury is done to land or goods, the compensation to be awarded should be proportioned to the amount of the plaintiff's interest therein—*B. C.* 851—2.

266. In an action against the sheriff for wrongfully seizing the plaintiff's goods it was remarked by *Alderson*, B. that juries have not much compassion for trespassers, and are not bound to "weigh in golden scales" how much injury a party has sustained by a trespass. And, in actions for criminal conversation, for seduction, or for malicious injuries, juries have been allowed to give what are called *vindictive* damages, and to take all the circumstances into their consideration,—a remark which seems applicable also to any case in which the process of a Court of justice has been abused, and a gross outrage has been committed under the forms of law.—*Ib.* 853.

267. Whether damages be regarded as "a compensation and satisfaction for some injury sustained" or as in their nature penal, so that they may, in certain cases, be given to punish or to deter, and not merely to compensate, the inquiry, how far a jury in assessing damages for a tort may properly take into account the motive and intention which actuated the wrongdoer, is one of much interest and importance.—*Ib.* 853—4.

268. It is clear, that, if a trespass be done to my land, or if my goods are illegally withheld from me, or if I sustain personal injury by reason of the negligence and want of due caution of another, I may maintain against him an action of trespass, trover, or on the case, to support which no evidence will be required of any malicious motive or wrongful intention on the part of the defendant.—*Ib.* 854.

269. In trespass the defendant pleaded that he had land adjoining plaintiff's close, and upon it a hedge of thorns; that he cut the thorns, and that they *ipso invito* fell upon the plaintiff's land, whereupon the defendant removed them thence as soon as possible. Upon demurer to this plea, judgment was given for the

plaintiff; for, in a civil action of this nature, "the intent is immaterial if the act done be injurious to another."—*Ib.* 854.

270. In very many rights of action founded upon tort, not involving malice or deceit, the intention wherewith an act was done and which gives to such act a colour and a meaning, is, like any other fact, to be determined by the jury. Let us suppose, for instance, that an action of trover or detinue is brought for a bill of exchange, and the defence be, that the bill was handed over to the defendant *as a gift*, the intention with which it was transferred to him would necessarily become at the trial the main, if not the sole, subject of inquiry; for a bill of exchange being a chattle, the gift would become complete "by delivery, coupled with the *intention to give*." "To pass the property in a chattle," says *Alderson B.*, "there must be both a gift and delivery; so that, where A had possession of certain silver plate belonging to B., and B. said to A., "I will give you all the plate that is mine," but no actual delivery of the plate ever took place, the words used were held to admit of their literal signification merely, and to be indicative of a bare intention to give at some future time.—*B. C.* 856—7.

271. Damages are either *general* or *special*. 'General' damages are such as the law implies or presumes to have accrued from the wrong complained of. 'Special' damages are such as really took place, and are not implied by law: they are either superadded to general damages arising from an act injurious in itself, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences. It does not appear necessary to state the formal description of damages in the declaration, because presumptions of law are not in general to be pleaded or averred as facts, and substantial damages may in some cases,—as in an action against a banker for not duly honouring a cheque or an acceptance of his customer, or for slander of a person in the way of his trade,—be recovered, although special damage be neither alleged nor proved.—*Ib.* 857—8.

272. When, however, the law does not, as of course, imply that the plaintiff sustained damage by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shown with particularity. And when the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law then in order to pre-

vent the surprise on the defendant which might otherwise ensue on the trial, the plaintiff must in general state the particular damage which he has suffered, or he will not be permitted to give evidence of it.—*B. C.* 858.

Maintenance to Hindus.

273. In awarding maintenance, the circumstances of the parties and the income of the family must be looked to. No separate maintenance can be allowed where the property manifestly is inadequate (Rs. 19-8 per annum) (*V. D. p.* 30.) or where the party sued has merely a floating and uncertain income (*S. D. p.* 272 of 1859). Nor can the Defendant's salary be taken into account in awarding it. (*Ib.* 5 of 1859)

274. *Mothers' maintenance.*—A mother is entitled to look to her son for maintenance notwithstanding that she has quitted her son's protection without adequate cause.—*Ib.* No. 13 of 1817.

275. *Wives' maintenance.*—To a wife maintenance will be denied when she quits of her own accord, her husband's protection upon his contracting a second marriage. (*Ib.* No. 2 of 1823). An unchaste wife is not entitled to any maintenance (*Ib.* No. 9 of 1829. See also *I. H. C. D. p.* 372). A Wife is not entitled to demand maintenance from her husband, unless she has been compelled to quit his house by his continued illusage or other sufficient cause (*V. D. p.* 30). The husbands marrying a 2nd wife is not a justifying cause (*I. H. C. R. p.* 375). A Hindu wife cannot during the life time of her husband, claim separate maintenance from any other member of his family.—*S. D. p.* 60 of 1860.

276. *Widows' maintenance.*—The right of a widow to maintenance is not affected by her refusal to reside in her husband's family (*V. D. p.* 29.) But where the widow assigns no reasonable grounds for her refusal to do so, a distinction of award of maintenance will be observed from that which she would have been entitled to in case of maltreatment, &c. (*S. D. p.* 59 of 1861). Where there is no paternal property she must reside with the surviving members of her husband's family and remain under their protection (*V. D. p.* 29). In such case the husband's brother is not liable to give maintenance (*Ib.* p. 30). Courts cannot award a share of family property to be made over to a widow for her maintenance (*Ib.* 31). The husband's family is bound to provide for a *minor* widow. Her support by her parents is purely voluntary, and they may refuse at any time to maintain. In a

divided Hindu family maintenance can only be claimed by a widow from that branch to which she belongs (*S. D. p. 91 of 1861*). A Widows' claim upon her husbands' family for maintenance is absolute and is not liable to be forfeited by failure to produce, on demand, jewels entrusted to her, though she may have bound herself by a written agreement to submit to such forfeiture (*Ib. 196*). A man cannot assign all he has to his widow for maintenance to the prejudice of his heirs.—*Ib. 271 of 1853*.

Maintenance to Son.—A son cannot claim independent maintenance under ordinary circumstances. In the case of *Parsaram Deo. v. Chaytania Anunga*, the Court of S. U. in allowing separate maintenance to the son, the plaintiff, observed that "it is manifestly incumbent upon the Courts by all proper means to uphold heads of families in the exercise of their parental authority and to discontinuance of all attempts on the part of children or others, to free themselves from the control of those who, by the Laws of nature, as well as by the usage of the country, are entitled to their obedience. Large separate allowance to the inferior member of a family, who for no cause or for an inadequate cause choose to abandon the family roof, would operate not only to encourage domestic feuds, but also to embarrass, and ultimately impoverish the head of the family. In cases therefore, where there appears no solid ground for the separation, the principles of equity require that the separate allowance should be reduced to the lowest scale. It should scarcely exceed what is barely necessary for the support of the party claiming it, (food and raiment.)"—*S. D. Vol. I. p. 277 and p. 38 of 1861*.

277. Illegitimate son of Sudra by concubine, not being a female slave, is entitled to maintenance.—*I. H. C. D. p. 293*.

278. *Arrears of maintenance.*—No rule of Hindu Law precludes the recovery of arrears of maintenance.—*H. C. D. p. 36 of 1864*.

279. *Liability.*—A Mahomedan is not bound to maintain his widowed stepmother. Nor is a Hindu dancing girl to her brothers' widow.—*S. D. No. 2 of 1821 and p. 175 of 1858*.

Interest.

280. Interest is always payable when there has been a contract to that effect, express or implied, from circumstances, the usage of trade, or the mode of dealing between the parties and also upon a Bond, Bill, or Promissory Note.—*S. M. § 419*

281. Act XXXII of 1839 provides that upon all debts, or sums certain, payable at a certain time or otherwise, the Court may if it shall think fit, allow interest not exceeding the current rate from the time when such debts or sums certain, were payable if such debts be payable upon written instrument at a certain time; or if payable otherwise than from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law.—*Ib.* 443.

282. Act XXVIII of 1855 repeals the Usuary Law and empowers the Judges to award interest at the rate (if any) agreed upon by the parties, and where no rate was fixed, at such rate as the court shall deem fit.—*Ib.* 444.

283. Section X of the recent Act XXIII of 1861, also empowers the Court to order interest in the decree, at such rate as it may think proper to be paid on the principal sum, adjudged from date of suit to the date of decree in addition to any interest adjudged on such principal sum for any period prior to the date of suit; with further interest on the aggregate sum so adjudged and on the costs of suit from the date of the decree to the date of payment.

284. Where bonds or deeds contain a rate, the Court will not award a higher rate than that stipulated in the bond even *after* the time fixed for payment (*Decree of Civil Court A. S. No. 419 of 1857*). For if it is the intention of the parties to obtain such interest, it is always in their power to insert in the Contract an express stipulation to that effect.—*B. C.* 335.

But the *S. U.* have held that the interest at 6 per cent was fixed on the transaction pending only the time agreed on for the fulfilment of the contract but when the contract was broken Plaintiff became entitled to the ordinary rate of interest in the country. *S. D.* 1861 p. 134. See also *H. C. D.* p. 205 of 1864—5.

285. Disallowance of interest stipulated in a document on the ground that no *demand* was made, is contrary to the judicial practice and precedent (*M. G.* 147). The delay of a gainer of Suit is no bar to his recovering interest. The same principle applies to suits for land, house and other productive adjudged, together with the rent, profit, &c. (*Ib.*) The maxim is "the

debtor must seek the creditor." A party is not liable for interest merely because he made a claim in consequence of which the party liable to pay principal amount, delayed such payment (*V. D. p. 21*). Interest was allowed on arrears of rent and of maintenance, and is also payable on Bonds which embrace interest upon former transaction, and even when it contains no express provision for payment of interest, or omitted to be claimed by plaintiff through inadvertence, the stamp on plaint being sufficient to cover interest and principal.

286. A party at whose instance money is withheld from a person entitled to it, is answerable for interest on that account (*S. D. No. 8 of 1825*). It is in the discretion of the court trying a claim to allow or refuse interest; and its judgment in this respect cannot be interfered with in higher court.—*Ib.* 1860 p. 228.

Mode of appropriation of payment.

287. Where a debtor is indebted in several ways to the same Creditor, and he pays a sum of money towards the debt, he may at the time of payment make application of that sum to any particular one of the several debts, owing by him, either by express words or by conduct indicative of his intention; but if he neglect to make it, the Creditor may make the application within any reasonable time, and if principal and interest are both due a general payment, in the absence of any specific arrangement as to its application, shall be ascribed first to the interest.—*S. M. § 445*.

288. When there is an account Current between the parties, such as Banking account, the law in the absence of any specific arrangement between them presumes, that they intended to apply the first item on the credit side to the first item on the debit side, and so on.—*Ib.* § 446.

289. According to law of England, where neither Creditor nor Debtor makes any appropriation of a payment, the law will apply it to the earlier debt.—*Ib.* § 447.

290. It was held that where the debtor made no appropriation of the payment made to any particular debt, the Creditor had a right to appropriate it to a debt barred by the statute of limitation.—*Ib.* 448.

291. Where there are distinct demands, one against a firm,

money of partners, and be not specifically appropriated by the payer, it cannot be applied to the debt owing by the individual partner.—*Ib.* § 449.

292. The consequence of a Creditor refusing payment when tendered, will be, that the payment of the sum tendered into Court will be a good defence against any action which he may bring for recovery of the amount ; unless the Creditor can prove a prior or subsequent demand and refusal, such a tender will also prevent interest from afterwards running against the debtor.—*Ib.* § 450.

CHAPTER V.

Custom and Usage.

293. Customs, may be either *general* or *particular*. Conspicuous amongst general customs stands the *lex mercatoria*, or law merchant, a branch of law deduced from the practice and customs of merchants, aided and regulated by a long series of judicial decisions, as also by the express enactments of the legislature; which has, especially of late years, exercised much vigilance in aiding fair commercial enterprise on the one hand, and in checking undue speculation on the other.—*B. C.* 10. It is not competent to parties simply by consent among themselves to alter the rules of succession as respects property to which they are subject.—*S. D. p.* 46 of 1862. It was held by Privy Council in the case of *C. Abraham, &c. Versus F. Abraham* that cases of succession to the estate of a deceased of pure Hindu blood who had married a European wife professing with his family, the Christian religion was to be decided to the usages of the class to which the deceased attached himself and the family to which he belonged. Upon the conversion of a Hindu to Christianity, the Hindu Law ceases to have any continuing obligatory force upon the Convert, who may renounce the old law by which he was bound, as he renounced his old religion, or if he thinks fit he may abide by the old law notwithstanding he has renounced the old religion. *Act XXI* of 1850 does not apply where the parties have ceased to be Hindus in religion. (*Madras Jurist*, p. 18).

294. A *particular* or *local* custom may be defined to be an usage which “has obtained the force of law, and is, in truth, the binding law within a particular district, or at a particular place, of the persons and things which it concerns.” A custom, therefore, in so far as it extends, supersedes the general law.—*Ib.* 11.

295. A custom, says Sir W. Blackstone, in order that it may be legal and binding, must “have been used so long

memory of man runneth not to the contrary ; so that, if any one can shew the beginning of it, it is no good custom. For which reason, no custom can prevail against an express act of Parliament, since the statute itself is a proof of a time when such a custom did not exist.”—*Ib.* 12.

296. A custom must have been *continued* ; because “any interruption would cause a temporary ceasing : the revival gives it a new beginning, which will be within time of memory, and, thereupon, the custom will be void. But this must be understood with regard to an interruption of the *right* ; for an interruption of the *possession* only for ten or twenty years will not destroy the custom. As, if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed though they do not use it for ten years, it only becomes more difficult to prove ; but if the *right* be anyhōw discontinued for a day, the custom is quite at an end.”—*B. C.* 13.

297. A valid custom must have been *peaceable*, and acquiesced in, not subject to contention and dispute ; for, as such a custom derives its force and authority from common consent, the fact of its having been immemorially disputed, either at law or otherwise, would be a proof that such consent was wanting.—*Ib.* 14.

298. A custom must be *reasonable*, or, rather, it must not be unreasonable. “A custom,” therefore, “may be good, though the particular reason of it cannot be assigned, for it sufficeth, if no good legal reason can be assigned against it. Thus, a custom in a parish that no man shall put his beast into the common till the 3rd of October would be good ; and yet it would be hard to shew the reason why that day in particular is fixed upon, rather than the day before or after. But a custom that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and, therefore, bad : for, peradventure, the lord will never put in his, and then the tenants will lose all their profits.”—*Ib.*

299. A custom ought to be *certain*. And, therefore, a custom that lands shall descend to the most worthy of the owner’s blood, is void ; for how shall this worth be determined ? But a custom, that lands shall descend to the next male of the blood exclusive of females, is certain, and, therefore, good. So a custom to pay two pence an acre in lieu of tithes is good ; but to pay sometimes two pence, and sometimes three pence, as the occupier of the land pleases, is bad, for its uncertainty.—*Ib.* 15—16.

300. A custom, though established by consent, must, when established, be *compulsory*, and not left to the option of every man, whether he will use it or no ; therefore, a custom that all the inhabitants of a particular district shall be rated toward the maintenance of a bridge will be good ; but, a custom that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.—*Ib.* 18.

301. Customs must be *consistent* with each other—one custom cannot be set up in opposition to another ; for, if both are really customs, then they are of equal antiquity, and must have been established by mutual consent, which to say of contradictory customs is absurd.—*B. C.* 18.

302. With reference to the interpretation of customs, it will be sufficient to mention the general rule, which is, that customs especially where they derogate from the general rights of property, must be construed strictly. They are not to be “enlarged beyond the usage.”—*Ib.* 19.

303. Beside local customs properly so called, there are, in different parts of the country, certain *usages* existing, which, unless excluded expressly or impliedly by agreement between parties, regulate, to some extent, the relation of landlord and tenant, or affect the reciprocal rights of incoming and outgoing tenants, and are usually known as ‘customs of the country.’ Now, a custom belonging to this class need not be shewn to have existed immemorially, but will be established on proof of a usage, recognised and acted upon in the particular district, applicable to farms of a like description with that in regard to which its existence is specifically asserted.—*Ib.* But a custom which has never been judicially recognised cannot prevail against distinct authority (*I. H. C. R.* p. 420.)

Usage of Canara.

304. *Native Christians.*—In Canara the rules of right in property for native Christians, are Hindu Law, with some exceptions (*S. D. p.* 195 of 1859.) The right of management of property of Roman Catholic Churches is vested in the community, and not in the priests.—*Decree of Civil Court of Mangalore A. S. No.* 200 of 1860.—Confirmed by High Court *S. A. S. No.* 768 of 1861.

305. *Landlord & Tenant.*—A Moolgueny tenant is authorized without the permission of the landlord, to cut down trees from the

land for the use of cultivation and building house, &c. (*Ib. No. 367 & 349 of 1859*), and an outgoing tenant is always entitled to remuneration for improvements made by him.—(*S. D. p. 45 of 1860.*)

Allia Santhan Rules.

306. Another peculiar usage prevails in Canara, (as in Malabar) which is well known by the name of *Allia Santhan*; the rules of which are to be found in Chapter XIII of Mr. Strange's *Manual of Hindu Law*, and *Bootalpandy*, of which the following is a translation regarding the system of succession, collected from the famous Decree passed by Mr. Anderson in A. S. No. 82 of 1848.

"The eldest child of the eldest sister, be it male or female, is to be the Ezman (manager), and is to hold the property as such; but it cannot be divided among the family. The remaining Members are to act under the authority of such female or male Ezman. If a disagreement takes place between the sisters, the elder sister is to provide the youngest sister with a separate house and its necessary apparatus, retaining the general Ezmanship and the performance of ceremonies. But no division of property (*Nishoodies*) can be made. To the dignities of chief families held by the Ezman of the senior branch, the members of his own Santhan will in his demise be entitled to succeed. Those of the junior branch shall have no right. If all the members of the senior branch be extinct, then those of the junior will have a right. The husband is not permitted to confer upon his Wife any gifts but the marriage present; if he give one piece more the family may resume it. The father may give whatever self-acquired property he likes, but no ancestral property, to his children. This his private property may be inherited by his children. In failure of collateral descendants a female of the same *Bulli* must be adopted. Males cannot be adopted. From failure of heirs *Allia Santhan* Estate, cannot be sold, nor transferred to the Wife's Children. He must adopt a female who is to inherit the property. If a family becomes extinct without such an adoption, the elders of the caste should assemble and adopt another couple of people from the same lineage, whose offspring then succeeds to the property."

"No mention is made in the above Extract of any provision being made in the case of Males of a family not agreeing. It is clear that the females, as being the Channel through which succession runs, are looked upon as vested with the property. There can be little doubt that one object in the establishment of the *Allia Santhan* system, was to prevent the division of property. In South Malabar where all the females reside in their family house the system is complete. The Pundit in reply to queries put to him, has stated that by the analogy of Hindu law he considers the males entitled to an equal share as the females; but this is not the case—an equal division amongst sisters in an *Allia Santhana* family corresponds by analogy with an equal division amongst brothers in another Hindu family. It is clear that, if males were entitled to a

share in the family property the portion allotted to them must of necessity, at their death, go out of the family and that is against the theory of all Hindu Law and more especially of the Allia Santhan law as laid down in the Bhootal Pandi. Had the females resided in the family house as in Malabar, the system of non-division might with justice have been rigidly adhered to by the Courts of law; but as it is the custom in Canara, for women, when married, to live with their children in their husbands' houses, different branches of a family naturally spring up, and justice often requires that a division of a family property should take place. But if a division is to be made, it must be made exclusively according to the rights of the females who may be, or may have been, the heads of the different branches amongst whom it is to be divided. The Male members have only the right to live and be maintained on the portion of the property which may be allotted to the share of their female ancestor. In extreme cases however, (as in the present,) when there is a quarrel between a male member and the female head of his branch and there is no chance of their living amicably together on the same estate, there appears no objection to allowing him in lieu of maintenance a portion of the estate during his life, upon the conditions of his not being authorized either to mortgage or sell it."

The foregoing decree was over-ruled and it was held that division of family property cannot be enforced by one of the members.—*I. H. C. D. p. 380.*

307. The following are some of the rulings regarding Allia santhan—

Adoption—By a female having male issue is invalid.—*S. D. p. 138 of 1859.*

Alienation by females—Of the family property without the consent, and in opposition to the acts of the male Ezman, is invalid, and cannot be confirmed (*Civil Court Decree A. S. No. 7 of 1845*), and Mr. Chatfield observed (*Ib. No. 295 of 1859*) that "the above is a decided and correct ruling and ought to be rigidly observed in order to prevent its running into ruinous laxity and contradiction." See also Appeal Decree Nos. 103 of 1862 and 365 and 371 of 1861. Special Appeal Nos. 733 and 734 of 1861.

Inheritance—The right of inheritance goes to the lineal descendants of the acquirer of property and not to the heirs of his previous remote ancestors though there is no female issue in the former branch (*A. S. No. 173 of 1858*). Undivided sister is preferable to divided brother.—388 of 1861.

Land acquired by any member of the family [governed by the law of Marumakkatayam in Malabar] becomes the joint property of all the members.—*S. D. p. 226 of 1859 & 133 of 1860*, unless he disposed of the same during his life time. The acquirer

may hold alienate at once, and incumber his self-acquisitions. A Karnavan in possession of family funds is presumed to have made all acquisitions with them and for the benefit of the corporate body. But such presumption is not irrebutable, and his alienation or charge of such acquisitions made during his life time may be valid.—(II. *H. C. D.* p. 162.)

A member cannot make bequest of family property out of the lineal descent.—*Ruling* p. 165

The acts of a mother are binding on the daughters, unless the transaction was fraudulent and effected with the desire to injure the children (*Civil Court Decrees* Nos. 160 of 1846, and 55 of 1858). Private division of family property to male members was upheld in *A. S.* Nos. 264 of 1835, 91 of 1836, 315 of 1838, 160 of 1864, and 536 of 1857. The Ezman can let out family land on Moolgueny.—*A. S.* Nos. 269 of 1850, 144 of 1859, and 265 of 1861.

CHAPTER VI.

Estoppel.

308. Estoppel is where a party is prevented, or estopped from pleading contrary to his own previous deed, or statement, or to some judgment to which he was a party.—*K.* § 33.

309. There are three kinds of estoppel. 1st, By matter of record; 2d, By deed; and 3rd by matter of general notoriety—*Ib.* 34.

1) By matter of record. The law presumes that a record of a Court of Law has been drawn up with care and precision, and, in order that there may be an end of litigation, it presumes conclusively that the record is true, and allows no one to prove the contrary, (except on fraud, *B. C.* 272); and in the case of matters decided by a judgment to which the person was neither a party nor privy. So, where the record shows that the proceedings were properly conducted, the contrary cannot be pleaded by a party thereto; nor will evidence be admitted to shew that a deposition has been incorrectly recorded.—*K.* § 34.

The effects of judgment of a Court of justice will be noticed in another place; and we have here only to observe that where a judgment is conclusive against a party, he is estopped from raising the same issue again in a fresh action.—*Ib.* 35.

2) Estoppel by deed.—The English Law considers the execution of a deed under seal, such a solemn and deliberate act, that a man is estopped from pleading or proving any thing in contradiction of his own deed. But this does not apply to any fact which may be inferred or gathered from the deed by argument and which is not particularly mentioned (*K.* § 37). A deed may be impeached for fraud or illegality.—*B. C.* 288.

3) Estoppel by matter “in pais” seem to have been originally acts which might be generally known in the “pais” (country or neighbourhood), and which might be easily ascertained without much inquiry.—*K.* § 38.

310. This class of estoppels has of late, been much extended, so as to include acts which are not of a notorious character. Starkie lays down the general rule that "where a person assents to an act, and derives, and enjoys a title under it, he cannot impeach it. "So in a suit to recover arrears of rent, the tenant in enjoyment is estopped from questioning the landlord's title under which he holds the land.—*K.* § 39.

311. Further where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.—*Ib.* § 40.

312. The term "wilfully" here used means that the person making the declaration "intended it to be acted on."—*B. C.* 842. (m).

313. If a man induces a tradesman to supply a woman with goods by a representation that she is his wife, he will be concluded by that representation, and will not afterwards be admitted to show that she was not his wife.—*K.* § 41.

314. Any estoppel by matter of record, or by deed, must be pleaded, and if it be not mentioned in the pleadings, the Court will not be absolutely bound by it; it will only be a matter for its further consideration. So in the case of a previous judgment in the same matter and between the same parties, if it be relied on in the pleadings it will act as an estoppel on all enquiry into the merits, but if the previous judgment has not been noticed in the pleadings the whole case is open to inquiry and the judgment will only be a matter for consideration.—*Ib.* 42.

315. This, however, does not apply to estoppel by matters in "pais" which need not, and often cannot properly be introduced in the pleadings; and the Courts are bound by such estoppels though not pleaded.—*Ib.* 43.

316. Lastly it is a rule of Law that no one shall be allowed to take advantage of his own wrong, guilt or fraud: and upon this ground a party is estopped from enforcing by means of a Civil Suit any immoral or illegal contract.—*K.* § 44.

317. The doctrine of estoppel has been guarded with great strictness, not because the party enforcing it necessarily wishes

to exclude the truth, for it is rather to be supposed that that is true which the opposite party has already recited under his hand and seal, but because the estoppel may exclude the truth. It is therefore a recognised rule that estoppels must be certain to every intent; which seems to amount to this,—that it must meet and remove by anticipation every possible answer of the adversary.—*B. C.* 195.

Where A sued B for moneys alleged to be due under certain documents and B pleaded that the demands had been included in a settlement of accounts, embodied in a document which he set forth in his answer, and the suit was dismissed on the ground that being included in the settlement, the demand no longer existed as cause of action. It was held that A's representative was not estopped from disputing the document in a subsequent action brought by him against the representative of B. (*I. H. C. D. p.* 312.) See also page 174 of 1864-5. The strict technical doctrine of English law as to estoppels in the case of deeds under seal does not apply to the written instruments ordinarily in use among the natives of India and a Defendant can show that only part of consideration was received. (See also page 26.—*Ib.*) And page 240 of I Vol. : as regards Razeed cases.

318. The following are the instances in which the late Suder Court have held the law of estoppel.—

1) A party who, when sued, confesses the debt and suffers judgment, is estopped from afterwards pleading that the Creditor had in bad faith never advanced the sum, as promised at the time of such confession.—*S. D. p.* 201 of 1858.

2) A party who in a suit pleaded that he is a divided member of a Hindu family, is estopped from afterwards raising a contrary plea.—*Ib. p.* 75 of 1859.

3) Where a Plaintiff deliberately avers in his plaint that he is in possession, he is estopped by his own act from afterwards applying to be put in possession.—*Ib. p.* 260 of 1859.

4) Where the Defendant had previously admitted, in an investigation before a Revenue Authority, that he held the land on mortgage from the Plaintiff, he was held to be bound by such admission, and estopped from disputing Plaintiff's title, in a Suit to redeem the land.—*Ib. p.* 23 of 1860. *I. H. C. D. p.* 245.

5) Where a party's Pleader had, in a former suit, between the

same parties, admitted that his client had no claim upon the property in dispute, his client was held to be concluded by such admission.—*Ib.* p. 31.

6) A party who has referred to a division, as a transaction in which he was concerned, and one that has been in part carried out, is precluded from afterwards disputing the fact of such division or his liabilities under it.—*S. D.* p. 54 of 1860.

7) If a party at any time admit that certain persons are entitled to a share in the family property as adopted members, he cannot afterwards dispute the fact of their adoption.—*Ib.*

8) Where a party had signed a document purporting to be a list of all the lands belonging to a pagoda, he was held to be precluded from afterwards pleading that certain land in his occupation, which was not included in such list, was the property of the pagoda.—*Ib.* p. 84 of 1860.

9) Where the Plaintiff, a Hindu Widow, admitted that she had consented to certain arrangements for division of the family property and keeping up some branches of the family by adoptions, and had lived six or seven years with one of the Defendants as her adopted son, it was held that she was estopped by these acts from disputing the fact either of the division or adoptions.—*Ib.* p. 91.

10) Where a petition containing a relinquishment of Plaintiffs' claim, had not been formally presented by her pleader, owing to his learning that she withheld her consent thereto, it was held that the act was not complete and that she could not be bound by the petition, though in some manner it had been received into the records of the Court.—*Ib.* p. 116.

11) Where the defendant had, in several depositions given before the Revenue Authorities, recognized Plaintiff as the duly adopted son of a coparcener, it was held that he was bound by these admissions, and could not adduce oral testimony against the adoption, or its validity if made.—*Ib.* p. 142.

12) Where the plaintiff had executed and delivered to the defendant a written discharge in full from all demands, he was held to be estopped from afterwards alleging that she had to account to him for money due under another instrument.—*Ib.* p. 188 of 1860.

13) Where a Collector, when about to sell a Zemindary in

execution of a decree, recommended the owner, a Hindu female without heirs, to come to terms with her creditor and in pursuance of the agreement thereupon entered into the estate at her death vested in the creditor, the Collector was held to have thus acted as the Agent of the Government, and to be estopped thereby from afterwards alleging in a Suit brought by him as the representative of the Crown, to recover the Zemindary as an escheat, that the owner was incompetent under Hindu Law to alienate the Zemindary without his consent.—*S. D. p. 216.*

14) The admission by one of the defendants of the plaintiff's claim to certain land, by signing the registry of the plaintiff's deed, although virtually estopping the said defendant from disputing its validity does not prejudice the rights of other defendants in whose favor he had disposed of his rights two years prior to his signature of the registry.—*Ib. p. 241.*

15) Where a coparcener had agreed to certain term for partition of the family property, had executed a deed, and taken possession of his share, he was held to be estopped from afterwards disputing the terms of such partition.—*Ib. p. 248.*

For further particular, see Smith's L. Case.—Page 666 and *H. C. D. P. 31 of 1864.*

CHAPTER VII.

Limitation Rules.

319. The object of the Statutes of Limitation is, "to preserve the peace of the kingdom, and to prevent those innumerable perjuries which might ensue if a man were allowed to bring an action for an injury committed at any distance of time.—*B. C.* 205.

320. Civil Courts are prohibited from taking cognizance of any suits which are barred by limitation rules. (*Cl. 4, Sec. XVIII, Reg. II of 1802, & Sec. I, Act VIII of 1859*). Courts are also authorized to reject plaints, if upon its face or after questioning the Plaintiff, it appears that the right of action is barred by the lapse of time. *See also S. D., p. 358 of 1862-3. (Ib. § 32)*. It is not necessary that the opposite party should allege the fact. (*Morley's Digest, p. 247, § 141*). The Appellate Courts are also bound to take notice of limitation rules, even in case of any plea on the subject had not been brought forward in the Original Court. (*Ib. § 142.*) Mr. Justice Holloway has however ruled that such plea should be pleaded in the Original Court: (*II. H. C. R., p. 238.*) Vakeels should therefore very carefully examine this point, and ascertain whether the claim is barred.

321. One uniform period of 12 years is the limitation prescribed in Clause 4, Section XVIII, Regulation II of 1802. The new Limitation Statute Act, No. XIV of 1859, prescribes periods of One, Three, Six, Twelve, Thirty, and Sixty years, as limitations to suits, the periods varying according to the nature of the claim as follows.—

Limitation of one year.—For suits to enforce any right of pre-emption, suits for penalties or forfeitures for breach of any Law or Regulation; for damages for injury to person, property, reputation, infringement of copyright or any exclusive privilege, for recovery of wages of servants, artizans or laborers, the amount of Tavern bills, or bills for board or lodging, summary suits under Regulation V of 1822. Suits to set aside sale of any property in

execution of a Decree of any Civil Court not established by Royal Charter, or sale of property for arrears of Government Revenue or other demand recoverable in like manner. Suits by Putneedar or proprietor of any other intermediate tenure saleable for current arrears of rent, suits to set aside sale of any Putnee Talook or such other tenure sold for current arrears of rent; suits to set aside attachment, lease or transfer of any land or interest in land by the Revenue Authorities, or to recover money paid under protest to them, and suits to set aside or alter summary decisions and orders of the Civil Courts not established by Royal Charter. (Cl. 2 to 5, Sec. I.) *S. M.*, p. 132.

Limitation of three years.—Suits to recover property comprised in an order made under Cl. 2, Sec. I, Act XVI of 1838, or Act IV of 1840. Suits for hire of animals, vehicles, boats or household furniture, value of articles sold by retail, rent of buildings or land, for recovery of money lent or interest, or for breach of any contract, unless there is a written engagement to pay the money lent or interest, or the contract is in writing and signed by the party to be bound thereby or by his Agent. Suits for recovery of money lent, interest, or breach of contract where there is a written contract which has not been registered. (Cl. 7 to 10, Sec. I.) *Ib.*, p. 132.

Limitation of twelve years.—Suits in cases governed by the English law upon all debts and obligations of record and specialities, and for recovery of any legacy, for recovery of immoveable property or any interest therein, for shares in joint family property and for maintenance when such maintenance is a charge on any Estate, and suits by proprietor of land to resume or assess Lakheraj or rent-free land, provided such land has been held rent-free from the time of the permanent settlement. (Cl. 11 to 14, Sec. I.) *Ib.* This provision also extends to bonds containing hypothecation of immoveable property. (*II H. C. R.*, p. 51 and 307.) But such bonds are not less than a mortgage, and must be registered under Reg. XVII of 1802. If not so registered, 3 years will only be allowed. *Ib.*, p. 108.

Limitation of thirty and sixty years.—To suits against a depositor, pawnee, or mortgagee, of any property moveable or immoveable, for the recovery of the same, a period of *thirty years* if the property be moveable, and *sixty years* if it be immoveable. (Cl. 15, Sec. I.) *Ib.*

Limitation of six years.—This period is allowed to all

suits for which no other limitation is expressly provided by the Act. (Cl. 16, Sec. I.) *S. M.*, p. 132, and *II. H. C. R.*, p. 21.

322. No length of time will bar suits against trustees or their representatives during their life-time, for breach of trust, but suits to make good, losses occasioned by a breach of trust, out of the general estate of a deceased trustee, will not be maintained unless brought within the proper period of limitation according to the last preceding Section, to be computed from the decease of such trustee. A co-trustee will not, however, be prevented from bringing a suit to enforce a claim for contribution against the estate of a deceased trustee within six years after such right of contribution shall have arisen. (Sec. II.) *Ib.*

SECTION I.

Cause of Action.

323. In considering the practical application of the Limitation rules, it is necessary, in the first place, to ascertain precisely in each case what is the Original Cause of Action from the date of which the period of limitation is to be computed.—*M. G.* 25.

324. In suits for recovery of property purchased from depositors, pawnees or mortgagees, the cause of action shall be deemed to have arisen at the date of purchase. Suits to avoid encumbrances or under-tenures in an estate sold for arrears of revenue or in a putnee Talook or other tenures similarly sold, limitation begins from the time such sale became conclusive. Suits between merchants for balance of accounts current, the period of limitation shall be computed from the close of the year, in the accounts of which, there is the last item admitted or proved indicating the continuance of mutual dealings. In cases where a person is by fraud or by concealment of a document left ignorant of a right of action which he may be entitled to, the limitation shall be computed from the time when the fraud first became known to the person affected by it, or when he first had the means of producing or compelling the production of the concealed document. In cases of fraud, the cause of action shall be deemed to have arisen when the wronged party first had knowledge of it. In case where a person is legally incompetent to sue when the right of action accrues to him, the period of limitation reckons from the time such disability ceases ; but if the limitation period

allowed exceed three years, he must bring the action within three years after his disability shall have ceased. No time will, however, be allowed to a person for a subsequent disability or for the legal disability of any, one claiming through him, if, when the right of action first accrued, he was not legally disabled. (Sec. 5 to 11.) *S. M.*, p. 133.

325. Where a person is dispossessed of immoveable property otherwise than by due course of law, he may recover possession notwithstanding any title that may be set up, provided that the suit be commenced within *six* months ; but this will not bar the person from whom possession shall have been recovered, or any other person, from instituting a suit for establishing his title to such property within the time limited by this Act. (Sec. XV). *Ib.*

326. This Statute, however, is not to interfere with equitable jurisdiction of the Supreme Courts, and not to extend to public property, nor to suits for the recovery of public claims, nor will it apply to suits that were pending at the time the Act was passed, nor to suits that may have been instituted within two years from the date on which the Act was passed, so that it was intended that the provisions of the Act should not actually come into operation till after the 5th May 1861. (Secs. XVI, XVII, and XVIII). But Act XI of 1861 provides that all suits now pending or which shall be instituted before the 1st January 1862 shall be tried and determined as if Act XIV of 1859 had not been passed, and that Sections XIX to XXIII, which prescribe the limitation for the execution of judgments of the Supreme Court, and of Courts not established by Royal Charter, as well as for execution of a summary award of Civil Court or Revenue Authority, shall not take effect or have any operation before the said 1st day of January 1862.—*Ib.* 134.

327. In regard to contracts, the limitation period is not computed from the time the contract was made, but from the date on which a breach of the contract took place whereby a right of action thereon would accrue to plaintiff.—*S. M.*, p. 133.

328. Where a contract is to be fulfilled on any future occasion, or when any contingent event takes place, the period is to be computed from the arrival of the specified period, or from the time when the event occurred.—*Ib.*

329. In the case of a bond payable by instalments, and containing provision "and upon failure to pay a single instalment, the

whole principal sum secured should immediately become due and recoverable with interest," it was held that the cause of action arose on failure to pay the first instalment. •Allowing a further time for payment after default, was quite an optional forbearance and indulgence on the part of the plaintiff. (*I. H. O. R.*, p. 209.)

330. When a man is wrongfully ousted from the possession of that which he previously possessed, the cause of action arises at the moment when the privation of right occurs. When a man is deprived of his right by an order of Magistrate, the time runs from the date of such order and not from the date of its being affirmed. When property is wrongfully attached and sold in execution of a decree, the time runs from the sale, and not from the attachment. When a man is wrongfully excluded from the enjoyment of that which he has not possessed, the cause of action arises at the time when he first becomes entitled to demand such enjoyment. Where a son or other relative claims as heir to his ancestor, the time runs from the death of the ancestor. When persons make a partition of joint estate, including outstanding debts, and one of them, afterwards realizes an outstanding debt, the cause of action runs from the realization. A bond to secure the payment of an old debt constitutes a fresh cause of action. Upon a note payable at sight, the time runs from the day when it is presented for payment. Upon a note payable by instalments, from the several dates when the instalments fall due. In the case of a conditional debt from the fulfilment of the condition. In the case of a guarantee, from the happening of the event against which the guarantee was given, that is, from the time when principal makes default. In the case of a mortgage redeemable at a stated period, the cause of action must be dated from the expiration of that period. Upon a warranty as to the quality of goods sold, from the time the goods turn out to be otherwise, than they are warranted. In the case of a surety seeking to recover from his defaulting principal, the time runs from the date of his payment of the debt or of each instalment, if he has paid it by instalments. In the case of goods sold, if no specific credit be agreed upon, the time begins to run from the day of the sale, but if specific credit be agreed upon, it runs from the expiration of the credit. Where Hindoos are entitled to require the performance of certain ceremonies by the members of their family, each refusal to perform the ceremonies constitutes a separate ground of action. When the prescribed period has begun to run as against any man, those who derive title under him whether by purchase,

gift, or inheritance, are subject to its operation, precisely as he could have been, if he had lived and had continued entitled. If the owner of the estate A, has claims as such owner to a portion of land which is held as part of the adjoining estate B, but a part of prescribed period has run against such claim at the time when the estate A comes into his possession by purchase of any kind, he has only the remaining period for the prosecution of his claim.—*M. G.* 25 to 27.

331. In execution of decrees, the time is to be calculated from the *expiring* of the appeal period if such decrees were appealable, and if not appealable, from the date of judgment.—*C. O. S. U.*, 1st July 1858.

332. The cause of action will run from the time when a Plaintiff by writing “contemplates the necessity of enforcing his claim by action.”—*V. D.* 27.

333. If a claim was preferred within the prescribed time, it cannot be refused on the ground that it was not brought within a *reasonable period*.—*S. D.*, p. 152 of 1860.

334. If a party bring a suit for land the Defendant's possession becomes from that time adverse, and if the suit be withdrawn, the limitation rule will run from the date of the plaint.—*Ib.*, p. 169. A plaint which was presented within 3 years, but returned for amendment without specifying a time for such amendment, and re-produced and filed some days beyond the 3 years, the cause of action should be computed from the date of original presentation.—*I. H. C. R.*, p. 427.

The fact of a plaint having been registered on the file does not debar the Court to reject it as barred.—*Ib.*, II. Vol., p. 51.

335. Where there was actually a trust and after a lapse of time its extent only was denied, and no injury was sustained till then, it was held that the cause of action arose at the time of such denial.—*Ib.*, p. 219 of 1858.

336. The Tahsildar's order cannot be taken as a cause of action, (*Mis. P. No.* 529 of 1859); nor can the order of a Collector.—*S. D.*, p. 66 of 1859.

337. In a suit, the precise period at which the cause of action had its origin not being ascertained with certainty, the matter at issue was determined exclusively upon its merit.—*Ib.*, No. 1 of 1823, and *M. G.* 28.

338. If undue means have been resorted to for obtaining a decree, it is the duty of the party injured at the time, and not 15 years afterwards to bring the subject to the notice of competent authority.—*S. D.*, No. 12 of 1823.

339. Between landlord and tenant the cause of action arises when the tenant ceases to pay rent.—*V. D.* 27.

340. Where Plaintiffs admitted that the Defendant had been in adverse possession for 25 years, their claim to the land was held to be barred, though the lease originally granted to them by the Collector was still in their hands.—*V. D.* 27.*

SECTION II.

First exception to the Limitation Rules.

Demand and Acknowledgment.

341. The effect of the Statute of Limitations is not to extinguish the claim or debt, but to bar the remedy, and therefore a demand and acknowledgment made at any time within the period prescribed by the Statute, will give a fresh starting point from which the operation of the Statute is to be reckoned in respect to such debt; thus supposing A gave B the loan of a sum of money on interest on the 1st February 1858, the claim will, according to Clause 9, Section 1 of the new Act XIV of 1859, be barred by the operation of the Statute after the 1st February 1861, which will embrace a period of three years, but if at any time within this period, say on the 1st January or even on the 30th or 31st January 1861, A demanded the sum and B admitted the justice of the demand or promised in writing to pay the debt, the Statute will begin to run from that date for a further period of three years.—*S. M.*, p. 134.

342. It was held in *S. A.* No. 24 of 1851, that when a claim is once barred, no subsequent admission can revive it, but this was overruled in *S. A.* No. 32 of 1853, and in the case of *Gibbons v. McCasland* it was said by Lord Ellenborough that, "if a man acknowledge the existence of a debt barred by the Statute, the law has been supposed to raise a new promise to pay it, and thus the remedy is revived; but no such effect can be given to an acknowledgment, where the cause of action arises from the doing

* All suits instituted since January 1862 are to be governed under new limitation rules. (Act XIV of 1859.) *II. H. C. R.*, p. 42 and 268.

or omitting to do some act at a particular moment in breach of a contract."—*S. M.*, p. 136.

343. An absolute admission of some debt, or a general promise to pay, not specifying any amount, will suffice to take the case out of the Statute; but although there be an unequivocal and distinct acknowledgment, yet, if it is accompanied by a refusal to pay, the Statute will not be barred.—*Ib.*

344. An admission to prevent the operation of the law for the limitation of suits, must be such, as to induce the creditor to refrain from instituting legal proceedings by holding out a hope to him that his claim will be amicably adjusted. But the simple offer of a specific sum by way of compromise does not involve an admission of the justice of the Plaintiff's demand, so as to suspend the operation of the rule of limitation; for, such offers are frequently made merely with a view to escape litigation. Although part payment is not sufficient to give a new period of limitation without a written acknowledgment of the debt, within Sec. 4, Act XIV of 1859, that Section does not require that the writing should express in terms a direct admission that the debt or part thereof is due. It is left to the Court to decide in each case whether the writing reasonably construed contains a sufficient admission that the debt or part of it is due. (II. H. C. R., p 307. See also page 19.) Where a suit is brought upon two bonds, one dated within, and one previous, to the period of limitation, and the second contains an acknowledgment of the money due on the first, and a promise to pay the same, the suit is not affected by the rule of limitation. If the admission be explicit, the form and the manner of making it are unimportant, and it is valid for the purposes of this law, though it be made in the course of miscellaneous proceedings. Where a man who is a co-sharer in a joint family dies, leaving a widow who is his heir, the period does not run against her, while she continues to receive maintenance from those in possession, on account of her right to her husband's share. But the real nature and intention of payment by the party in possession must be examined, for nothing can be inferred from mere presents or acts of bounty, specially between persons connected by blood.—*M. G.* 28 and 29.

345. The acquiescence of a party in an arrangement for the liquidating a debt incurred 13 years before prevents the operation of the law, and preserves to the creditor his right of action.—*S. D.*, p. 93 of 1858.

SECTION III.

Second Exception.

Where proceedings have been had.

346. A complainant can show that he directly preferred his claim within the prescribed period for the matters in dispute to a Court of competent jurisdiction to try the demand, in which case he must assign satisfactory reasons to the Court for not having proceeded in such former suit. The claim must have been preferred in the ordinary course of law. It is not enough that the plaintiff has made a summary or miscellaneous application to a Civil Court connected with the matters in dispute. (*M. G. 29 ; II. H. C. R., p. 22.*) Complaint made to Revenue officer cannot constitute an exception to limitation. (*Ruling, p. 82.*) In calculating the period of limitation, no allowance is made for the time during which an obligation for permission to sue as a pauper is pending in Court, for such application is merely preliminary to the institution of a suit, and the circumstance that the petition to sue as a pauper, and the petition of plaint have been written together, so as to form but one document, makes no difference, for, it can have no effect as a plaint until the applicant has been authorized to present one. Where there has already been a suit before a competent tribunal for the matter in dispute, which suit has ended in a non-suit or in dismissal, with permission to sue again, the period of limitation is computed from the accruing of the original cause of action, the time while the first suit was pending in the Court being deducted. The period of limitation is reckoned down to the day when the plaint is duly lodged by the complainant in a Court of competent jurisdiction, not to the day when it is filed. The period during which a suit is pending, which is finally struck off for default, does not prevent lapse of time under the Law of Limitation. Where the permission given is not a permission to sue again generally, but to sue after a certain event such as the decision of a different suit, the deduction should extend up to the time when the event happened, because the order of the Court in effect restrains the party from proceeding in the meantime. The widow of a deceased Moosulman having taken possession of her husband's property was sued by his heirs for that property within twelve years after the date of his death. She claimed to retain the property for the payment

of her husband's debts including the dower debt due to herself. The Court decreed in favor of the plaintiffs, and referred the defendant to a separate suit to establish her dower debt. Soon after the final decision of this suit, but upwards of twelve years after her husband's death, the widow sued his heirs for the dower debt. It was decided that her claim was not barred by the Law of Limitation. There was no one whom she could sue while she herself retained the property. A declaration in a decree that some person who may or may not be before the Court may sue, hereafter, for the whole or some part of the subject-matter of the suit, cannot control existing legal disabilities. It does not constitute a right, nor can it form a cause of action to prevent the operation of the rule of limitation. Proceedings must have been taken to enforce the same right. The pendency of proceedings will not exempt a claim from the operation of the Law of Limitation, if such proceedings have their origin wholly in mistake or fraud, and would not have been permitted but for the Court's ignorance of truth. A suit, not being a pauper suit, will be exempted from the operation of the rule, if proceedings which form an essential preliminary to the particular suit have been instituted within the prescribed time.—*M. G.*, p. 30 and 31.

347. It was, however, ruled by the Sudr Udalut that the mere institution of a civil suit, subsequently withdrawn, does not give a fresh starting point, nor does it prevent the operation of limitation. (*Ruling*, 294; *I. H. C. R.*, p. 320.) The pendency of another suit between other parties is no answer.—*Index of Bengal Decisions*, p. 195, *Secs.* 160 and 165.

SECTION IV.

Third Exception.

Disability.

348. The third exception is when the complainant can prove that, from minority or other good and sufficient cause, he had been precluded from obtaining redress. The rule of limitation does not operate during minority. Where a right, against

the period of limitation has already begun to run, devolves on a minor, the time which intervenes between the devolution of the right and the attainment of legal ability is deducted in computing the period of limitation. Order of the Court of Wards for removal of guardian of a minor held to be a good *prima-facie* evidence of the age of the party. If the evidence as to the age of the party alleging minority be such as to lead to no certain conclusion, the presumption is in favor of minority. The neglect of a mother will not debar the operation of law. (*S. D.*, p. 84 of 1862.) The fact that there has been a guardian and that he has neglected to sue, does not prevent the ward from suing after he obtains majority. But a right of suit once barred by time cannot be revived in consideration of the minority of any person, upon whom, but for such bar, it would have devolved. Madness has the same privilege as minority. Married women who can sue alone are entitled to no immunity. Where a person is absent in a foreign country, when the right of action arises, the rule does not begin to operate against him till he returns. But if he voluntarily goes abroad after the right has accrued to him, he is not excused. (*II. H. C. R.*, p. 113.) The residence of a female complainant at a distance of many hundred miles from the lands in dispute has been held to be no excuse for her delaying to sue within 12 years, there being circumstances to show that she must have had early notice that her rights had been usurped by some one. (*M. G.*, 31 and 32.) Imprisonment will remove the bar of limitation; but absence as above shewn is no excuse. (*V. D.*, 26.) Minority of a party will protect his share, but not the share of adult co-partner. (*Ib.*) If, in case of joint plaintiffs, the claim of one plaintiff is barred, the other may maintain the suit for the whole.—*Ruling*, p. 117.

349. In a case, the cause of action arose in 1795 in plaintiff's father who died in 1802—3, plaintiff was then a minor, and the cause had not become unactionable at the time of his death. It was held that the minority of plaintiff preserved the right of action beyond the limitation. (*V. D.*, 27.) A suit to recover property wrongfully alienated by plaintiff's mother, during his minority, must be brought within the time allowed by the law for limitation of suit reckoned from the date of plaintiff's coming of age, (*S. D.*, p. 252 of 1860), *i. e.*, from the completion of 16th year.—*Ib.* No. 7 of 1814.

350. A person who neglects to sue for rights which had been

withheld for 17 years after his attaining majority, is barred.—*S. D.*, No. 10 of 1822.

351. Where a part of the time expired in father's life-time, the remainder dates from the majority of the son.—*Ib.* No. 18 of 1858.*

SECTION V.

Limitation Rules applicable to Mortgage.

352. In regard to mortgages *prima-facie*, the right of redemption is not affected by the Statute (*Sadr Decision* 23, 1860), but the new limitation Statute Act XIV of 1859 has determined the period of limitation even as to mortgages, and allows 30 years for moveable, and 60 for immoveable property.—*S. M.*, p. 136.

353. In a suit by a mortgager for redemption, the statute runs not from date of mortgage, but from time for redemption limited in the mortgage bond.—*Ib.*

354. The law of limitation only takes effect in the case of a mortgagee from the date on which mortgager tendered payment of the money borrowed and the mortgagee refused to receive the same or deliver possession of the land. (*Sadr Dec.* 39, 1860). *Ib.*

355. Limitation will likewise apply to mortgagees not in possession, so as to bar his claim to the amount of the mortgage bond, unless such claim is preferred within the limited period.—*Ib.*

356. Limitation will also apply to usufructuary mortgages, from the time when the same was paid off by income, and mortgager demands the land, and is put off with excuses. (*Ib. A. S.* No. 255 of 1860, *Beltama, &c., versus Soobraiya, &c.*) Application to redeem a land from mortgage which is said liquidated in 1809 was rejected. (*Chatfield*, 8th October 1861, 296 of 1862, *Shivana versus Poottaya*, September 1862.)

357. Where the occupancy of defendant was found to have been originally permissive, and there was nothing to show that afterwards changed its character and became adverse, the limitation could not apply.†—*S. D.*, p. 127 of 1860.

* A suit cannot be brought on behalf of a Hindu minor to secure his share in undivided family property unless there is evidence of such malversation as will endanger the minor's interest if his share be not separately secured.—*I. H. C. R.*, p. 105.

† A mortgagee has the right of foreclosures, all the previous decisions of the late S. U. to the contrary overruled. (*I. H. C. R.*, p. 982)

SECTION VI.

Limitation Rules regarding Hindoo Family.

358. The ancestral property of a joint Hindoo family is divisible in due course of law, and this right is not barred except where the shares have been actually severed and separately occupied, or where the sharer who claims a division has received from his co-sharers, or from one of them, a fixed allowance by way of maintenance as a compensation for his share, or where he has been absolutely excluded from the possession of the land and from participation in its profits. In such cases, if the period of limitation had elapsed since such transactions took place, the right to a division is barred. Separate engagements with the Government for rent do not bar the right. Where a co-heir in possession of the joint property, remitted, out of its profits, money and goods to a co-heir who was absent, and had never taken possession, this was considered to amount to a recognition of the title of the latter and to make the title of the former a friendly and not an adverse possession, and consequently a possession not affected as between the co-heirs by the Law of Limitation. But the mere fact of payments or gifts having been made will not bar the operation of the rule, if it be not shown that the plaintiff has been in receipt of any portion of the profits of the estate. The question, therefore, will be upon what ground and with what intention the payments or gifts have been made.—*M. G.*, 34 & 35.

359. The following are the rulings about the division of Hindoo family.—

1) When division is denied, the fact may be ascertained by reference to separate possession of house, or separate transaction of affairs. (*Index to Bengal Decision*, 392, & § 290 of *Strange's Manual of Hindoo Law*.) But the Court of Sudr Udalut have ruled that presumption of law is that the members are undivided; the onus of proving division is on the party pleading it. To establish division, circumstances must be shewn of a nature incompatible with any other condition of the family but that of division. Living apart and having separate transactions are not conclusive.—*S. D.*, p. 51, and 230 of 1855.

2) Registry of an estate in separate portion in names of 3 brothers not conclusive.—*Ib.* p. 55 of 1858.

3) Mere execution of a deed of division not acted upon will not alter the condition of an undivided Hindoo family.—*Ib.* p. 30 of 1851 and 92 of 1857.

4) Execution of a deed of division without possession under it, is inoperative.—*S. D.*, p. 125, of 1853.

5) Decree for division unexecuted does not constitute division.—*Ib.* p. 157 of 1855.

6) When a party dies pending a suit, he is to be held undivided.—*Ib.* No. 11 of 1827.

7) Deed executed by father for division of his property after his death, possession under it not having been given by him in his life-time, is invalid.—*Ib.* p. 521, Vol. I.

360) In a suit for division of family property, by a cousin, the Original Court decreed for plaintiff on the ground that the relationship was proved, and that there was conclusive evidence that no division of family property had taken place. The Appellate Court, however, reversed the decree, and dismissed the claim as barred. Plaintiff's father having died 25 years before the institution of the suit, there being no proof of plaintiff ever having been in enjoyment of the property sued for, and the non-division of plaintiff's father and other members of the family proving nothing to establish the claim of plaintiff. The plaintiff contended in special appeal that his joint enjoyment of the land sued for, and joint performance of religious ceremonies of the family were proved; but the Sudder Udalt upheld the decree of the Appellate Court on the grounds that at the time of plaintiff's father he was not residing as a joint member of the family, and that it was proved that plaintiff never lived with his cousins, and it has not been found that any one act has been passed between them shewing that they were co-partners.—*Ruling*, p. 117.*

* The following are the latest rulings of the High Court on Hindu Law.

Adoption.—Of wife's brother is valid. So is also of an only son. (*I. H. C. R.*, p. 54.) But not of a natural brother. (*Ib.* p. 426a.) Nor of sister's son. (*Ib.* 420.) Nor of an orphan. (*II. Ib.* 129.)

A widow can adopt a son without the consent of her husband. (*Ib.* p. 206.) A widower also may take adoption. (*Special A. S. No.* 360 of 1864.)

The natural rights of a person adopted remain unaffected when the adoption is invalid. (*I. Ib.* p. 363.)

Undivided family.—Members of an undivided family may enter into an agreement with their co-parceners in respect of expenditure of family

CHAPTER VIII.

Presumption and Burden of Proof.

361. It is a point of great importance to decide in each case at the outset, in your own mind, and clearly to point out to the hearer, as occasion may serve, on which side the *presumption* lies, and to which belongs the (onus probandi) *burden of proof*. For, though it may often be expedient to bring forward more proofs than can be fairly *demanded* of you, it is always desirable, when this is the case, that it should be known, and that the strength of the cause should be estimated accordingly.—*W. R.* 72.

362. According to the most correct use of the term, a “*presumption*” in favor of any supposition, means, not (as has been erroneously imagined) a preponderance of probability in its favor, but such a pre-occupation of the ground as implies that it must stand good till some sufficient reason is adduced against it; in short, that the *burden of proof* lies on the side of him who would dispute it.—*Ib.*

363. Thus, it is a well-known principle of the Law, that every man (including a prisoner brought up for trial) is to be *presumed* innocent till his guilt is established. This does not, of

property and re-payment of self-acquired funds. (*Ib.* p. 309.) Undivided member is entitled to separate enjoyment of his self-acquired lands, which, upon his death, if it was not previously disposed of, devolves upon his coparceners, his widow being only entitled to maintenance. (*Ib.* p. 412.)

The member of an undivided Hindu family may alien his share of the family property. (*Ib.* p. 471.)

The ordinary gains of science are divisible when such science has been imparted at the family expenses, and acquired while receiving family maintenance. (*II. Ib.* p. 56.)

Manasa Puttra.—Where a Hindu made a gift to a person whom he said he has taken as his *Manasa Puttra*, he could not set it aside on the ground that he erred in supposing that the donee could perform his funeral right. (*I. Ib.* p. 393.) A conditional gift is valid in Hindu Law. (*Ib.* p. 403.)

course, mean that we are to *take for granted* he is innocent ; for if that were the case, he would be entitled to immediate liberation : nor does it mean that it is antecedently *more likely than not* that he is innocent ;, or that the majority of these brought to trial are so. It evidently means only that the “burden of proof” lies with the accusers ;—that he is not to be called on to prove his innocence, or to be dealt with as a criminal till he has done so ; but that they are to bring their charges against him, which, if he can repel, he stands acquitted.—*Ib.*

364. Thus, again, there is a “presumption” in favor of the right of any individuals to the property of which they are in *actual possession*. This does not mean that they are, or are not, likely to be the rightful owners : but merely, that no man is to be disturbed in his possessions till some claim against him shall be established. He is not to be called on to prove his right ; but the claimant, to disprove it ; on whom consequently the “burden of proof” lies.—*W. R. 72.*

365. A moderate portion of common sense will enable any one to perceive, and to show on which side the presumption lies, when once his attention is called to this question ; though for want of attention it is often overlooked : and on the determination of this question the whole character of a discussion will often very much depend. A body of troops may be perfectly adequate to the defence of a fortress against any attack that may be made on it ; and yet, if ignorant of the advantage they possess, they sally forth into the open field to encounter the enemy, they may suffer a repulse. At any rate, even if strong enough to act on the offensive, they ought still to keep possession of their fortress. In like manner, if you have the “presumption” on your side, and can but *refute* all the arguments brought against you, you have, for the present at least, gained a victory : but if you abandon this position, by suffering this presumption to be forgotten, which is, in fact, leaving out one-half, perhaps your strongest arguments, you may appear to be making a feeble attack instead of a triumphant defence.—*Ib.*

366. Such an obvious case, as one of those just stated, will serve to illustrate this principle. Let any one imagine a perfectly unsupported accusation of some offence to be brought against himself ; and then let him imagine himself, instead of replying (as, of course, he would do) by a simple denial, and a defiance of his accuser to prove the charge,—setting himself to establish a negative,—taking on himself the burden of proving his own innocence,

by collecting all the circumstances indicative of it that he can muster: and the result would be, in many cases, that this evidence would fall far short of establishing a certainty, and might even have the effect of raising a suspicion against him; he having, in fact, kept out of sight the important circumstance that these probabilities in one scale, though of no great weight perhaps in themselves, are to be weighed against absolutely nothing in the other scale.—*W. R.* 73.

367. Presumptions are divided into *ir-rebuttable* and *rebuttable*. Irrebuttable presumptions are such as the law will not allow to be questioned, or proved untrue. Rebuttable presumptions are such as may be rebutted or shewn in any particular case to be untrue. The following are some of the ir-rebuttable presumptions.—*K.* § 47.

1) A child under seven years of age cannot commit a felony.—*N.* § 680.

2) A sane man of years of discretion is conclusively presumed to contemplate the natural and probable consequence of his own acts.—*Ib.* § 681.

3) That every man knows the law. Ignorance of the law is no excuse.—*Ib.* § 684.

4) There is always a presumption on length of time on which stands the force of title by prescription, the reception of deeds, wills, writings, &c., after 30 years without proof. The maxim is "the Laws assist those who are vigilant, not those who sleep over their rights."—*Ib.* § 686.

5) Where a party had purchased a land from the head of a Hindu family, and had been in possession for *nine years*, the co-partners of the vendor were presumed to have consented to the sale, and were held to be precluded from pleading that their consent was not given.—*S. D.*, p. 258 of 1860. This was overruled subsequently, (*Vide Madras Law Journal*, p. 136), where a sale effected by one brother 11 years before was set aside as against other co-parceners.

6) A tenant is presumed to be a tenant at will where the lease is silent.—*Ib.* p. 162 of 1858.

7) So a bond is presumed not paid from its remaining unpaid in obligee's hand.—*Ib.* p. 22 of 1858.

8) That a matter already decided by a Court of final authority has been correctly decided, cannot be questioned in another suit between the same parties.—K. § 62.

Rebuttable Presumptions.

368. There is always a presumption in favour of any act of an official nature, that it has been rightly done. Whenever there is general evidence of acts having been regularly and legally done, the proof of those circumstances which probably attend them, is dispensed with. In such case the onus of proving the contrary or irregularity rests on him who disputes it.—N. § 697.

369. Where the judgment of a Court of competent jurisdiction is brought under review on appeal, that decision is not to be overturned unless the Court is perfectly satisfied that it is wrong. *Primâ facie*, it is to be considered a right decision, and is not to be deprived of its effect unless it is to be clearly proved to the satisfaction of the Judge that that decision is wrong; but he must consider the whole circumstances together, and if he still feels satisfied, upon the whole of the case, that the decision is wrong, he ought undoubtedly to overturn it; it is only to be considered as *primâ facie* right. The *onus probandi* lies on the opposite party to show that it is wrong, and if he satisfies the conscience of the Judge that it is wrong, it ought to be reversed.—B. L. M., p. 850.

The following is a list of Rebuttable presumptions:—

1) A Hindu family will be presumed to be undivided until the contrary be proved.—S. D., p. 1, of 1861.

2) Property acquired by a co-partner, while in management of ancestral property, will be presumed to have been acquired by means of the family possession in his hands, and the burden of self-acquisition lies upon him.—*Ib.* p. 8 of 1860.

3) That a person is innocent of crime or wrong.—N. § 717.

4) That an unlawful act was done with an unlawful intent.

5) That a person intends the ordinary consequence of his voluntary act.

6) That a person takes ordinary care of his own concerns.

7) That evidence wilfully suppressed would be adverse, if produced.*

* See also Spl. A. S. No. 31 of 1859, pages 122 and 123; and A. S. Nos. 4d 1862; Mangalore Civil Court, January 1863.

8) That higher evidence would be adverse from inferior being produced.

9) That money paid by one to another was due to the latter.

10) That a thing delivered by one to another belonged to the latter.

11) That an obligation delivered up to the debtor has been paid.

12) That former rent, or instalments, have been paid when a receipt for latter is produced.

13) That things which a person possesses are owned by him.

14) That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership.

15) That a person in possession of an order on himself or the payment of money, or the delivery of a thing, has paid the money, delivered the thing accordingly.

16) That a person acting in a public office was regularly appointed to it.

17) That official duty has been regularly performed.

18) That the ordinary course of business has been followed.

19) That a promissory note or bill of exchange was given or endorsed for a sufficient consideration.

20) That an endorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill.

21) That a writing is truly dated.

22) That a letter duly directed and mailed was received in the regular course of the mail.

23) Identity of person from identity of name.

24) That a missing member of Hindu family is dead after the absence of 12 years; and a Mahomedan after 90 years from his birth.—N. § 707.

25) That an obligation to pay money more than twenty years past has been extinguished.

26) That acquiescence followed from a belief that the thing acquiesced on was conformable to the right or fact.

27) That things have happened according to the ordinary course of nature and the ordinary habits of life.

28) That persons acting as co-partners have entered into a contract of co-partnership.

29) That a man and woman, deporting themselves as husband and wife, have entered into a lawful contract of marriage.

30) That a wife, acting with her husband in the commission of a felony, other than murder, acted by coercion, and without guilty intent.

31) That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate.

32) That a thing once proved to exist continues as long as is usual with things of that nature.

33) That the law has been obeyed.

34) That a document or writing, more than thirty years old, is genuine when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained.

370. It is necessary, however, to be cautious, as already noticed, that we do not let this presumption to be considered *conclusive*. It is not unusual for a false case to be met by a false defence; as where a claim for money supported by suborned witnesses is met by a forged receipt. Yet here the fabrication of the false evidence by the defendant ought clearly not to entitle the plaintiff to a verdict, as in point of fact the defendant owes him nothing. —N. § 711; B. L. M., p. 638.

371. It is to be observed that a presumption may be *rebutted* by an opposite presumption, so as to shift the burden of proof to the other side. Suppose you had advised the removal of some *existing* restriction: you might be, in the first instance, called on to take the burden of proof and allege your reasons for the change, on the ground that there is a presumption against every change. But you might fairly reply, "True, but there is another presumption which rebuts the former; every *restriction* is in itself an evil; and therefore there is a presumption in favor of its removal, unless it can be shown necessary for prevention of some greater

evil: I am not bound to allege any *specific* inconvenience; if the restriction is *unnecessary*, that is reason enough for its abolition: its defenders, therefore, are fairly called on to prove its necessity."—*W. R.* 80.

372. When there appears conflicting presumption, the rules are, that, 1. Special presumption takes precedence of general ones. 2. Presumptions derived from the course of nature are stronger than casual ones. 3. Presumptions are favored which give validity to acts. An act may avail rather than not avail. 4. The presumption of innocence is favored in law.—*N.* § 835 to 838, and *K.* § 83 to 85.

Burden of Proof.

373. The general rule is that the *onus probandi*, or burden of proof, lies on the party who in substance asserts the affirmative of the issue.—*N.* § 588. (*Vide also II H. C. R.*, p. 171.)

374. The following rule will be easier to use. The burthen of proof will lie on him who will fail if no evidence were given on either side, or if the allegation to be proved were omitted from the pleadings. (*K.* § 30.) If there be a rebuttable presumption in favor of one party, it will throw the burden of proof on the opposite party. Where any fact lies peculiarly within the knowledge of one of the parties, that party must prove it. (*Ib.* § 32.) Where a party's title up to a certain period is admitted, the burden of proof will lie on him who avers his purchase title.—*S. D.*, p. 26, of 1858.

375. Where a party admitted that land in his possession, and of which he claimed to be the owner, was once the property of another, who contended that it was held on mortgage, it was held that the burthen of proof lay on the party in possession. (*Ib.* p. 22 of 1859). A pleader suing for his fees must prove that they are due, and cannot be aided by his client's failure to prove that they have been paid.—*S. D.*, p. 43, of 1859.

376. A plea of limitation must be established by the party advancing it. (*M. G.*, 88.) But it has lately been determined by *S. U.* that "whatever the nature of the defence, it is for the plaintiff to clear the way for his suit by showing that it is not barred by the Statute of Limitation. The Court are convinced that this latter ruling is in conformity with the spirit of the statute, which is to guard parties from the risk of having to defend themselves against antiquated claims, which, if substan-

tial, the law presumes would be earlier urged, and to meet which after lengthened intervals would be subjecting the holders of property to unfair disadvantage. The Court consider that the letter of the law amply bears them out in this estimate of its spirit and intent. To cast the defendant, therefore, upon establishment of his title, would be to deprive him of the protection which the law has thrown around him."—*S. D.*, p. 165, of 1861, and *S. A. Nos.* 656 of 1860, and 112 of 1861. Where the defendant failed to prove the sale, no decision can be given rather on the weakness of his title than on the strength of that of the plaintiff. The latter has not established the lease on which he rests his claim and the fact of the Wurg is in itself insufficient in law to prove his title. *Vide S. D.*, pp. 17 and 64 of 1862, and also *A. S. No.* 385 of 1858, *Shum Bhut v. Luxoomama*.

377. Where a party by his own act deprives his opponent of the means of proving his case, the Court will presume everything against the party who acts thus.—*M. G.*, 88.

378. Whenever the proof of the negative is essential to support a party's claim, he must prove that negative. Thus, if A claims as heir to his brother B, he must not only prove his brother's death, but also that he left *no* issue.—*N.* § 591.

379. So where a party alleges that a duty has *not* been performed, he must prove it; he cannot shift the burden of proof by pleading affirmatively that his adversary has been guilty of culpable omission.—*Ib.* § 590.

380. So when death has to be proved, the proof cannot be shifted by pleading that the party is not alive. (*N.* § 590.) The *onus probandi* of exemption from rent lies on the defendant. (*Ib.* § 591.) Where plaintiff sued for arrears of rent and the defendant pleaded dispossession of the lands and payment of the full amount due by him, it was held that such plea being *special*, the *onus probandi* rested with the defendant. (*Ib.*) Where a claim is preferred on general and unquestionable grounds, such as inheritance, and the defendant pleads on special ground, the burden of proof is on the defendant.—*N.* § 591.

381. In action on contract, if the promise is not absolute, but contains any qualification, the plaintiff must prove that the defendant does not come within the qualification. For instance, a carrier has undertaken to carry goods safely, fire and robbery except-

ed; or where a horse has been warranted sound, except as to a kick on its legs.—*Ib.* § 593.

382. When a party seeks to avoid responsibility for an act, on account of some *exceptive* circumstance, he must prove it. As for instance, in an action against a police officer for arrest and false imprisonment, or in any case where the defendant justifies under the authority of the law, he must prove his authority.—*Ib.* § 595.

383. So a party seeking to avoid his contract on the ground that it was obtained from him by duress or fraud, must prove it. Where it is alleged that property which belonged to a member of undivided Hindu family was separate property, the burden of proof as to division lies upon those who assert its separate character. The burden of proof rests on him who alleges the self-acquisition.—*Ib.* § 590.

384. *Mulagueny right*.—It has been ruled on many occasions that all tenants' right are Chalgueny or temporary, until they can shew by indisputable evidence that they are Mulagueny or permanent. The rule is understood and will save much needless litigation, as every tenant will in future carefully protect his title or refrain from advancing a false one on frivolous pretence.—*Decree of the Civil Court of Mangalore A. S. No. 516 of 1861.* S. D., p. 162 of 1859. Civil Court A. S. No. 349 of 1862. Devala v. Salapa, January 1863. A. S. No. 354 and 355 of 1861. K. Runga Row v. Puthama and another. When Mulagueny is rejected, the Chalgueny to be presumed and the Moolagar to be allowed rent. October 1861, A. S. No. 507, 524 of 1862, Nagama November 1862.*

* An improper disposal of the property was not to be presumed against a purchaser from a Hindu widow, unless it appeared that, to the purchaser's knowledge, she was converting the estate for an unlawful purpose. (*I. H. C. R., p. 384.*)

CHAPTER IX.

Rules for Constructions.

The following are the rules for construction of statutes, deeds, and other written instruments.

Of Statutes.

385. The intention of the Legislature is always to be gathered if possible—1. From the words used by the Legislature. 2. From reference to contemporary exposition; that is to say, decisions which may have been made upon the subject at or near about the time of passing of the Act. The maxim is “contemporaneous explanation is the best and most powerful in law.”—*N.* § 744.

386. In determining on the meaning of the statutes, we are told to consider—1. What was the law before the passing of the statutes. 2. What was the *mischief* which the new Act was intended to remedy or repress. 3. What was the remedy applied. 4. What is the true reason of the remedy.—*Ib.* 745.

387. The intention of the Legislature is to be gathered from a consideration of the whole statutes; for no one can rightly understand a part until he has again and again read through the whole.—*Ib.* § 746.

388. The primary or “golden” rule, as it has been called, for the interpretation of statutes, is to give all the words of a statute their plain ordinary meaning, unless absurdity or injustice would be the result of so doing.—*Ib.* 747.

389. An affirmative statute giving a new right does not of itself and of necessity destroy a previously existing right. (*B. L. M.* 508). Thus the Regulation VII of 1817 affords a remedy to the community in general which might suffer from mismanagement of charitable endowments and trusts. But it cannot be held as taking away the natural and common right of the donor to insist on the due performance of his objects and intentions by the donee under trust.—*S. D.*, p. 39 of 1858.

390. The preamble of a statute is the key (*B. L. M.* 570), and may be looked at, to ascertain the subject-matter of the enactment. Neither the title nor the side-notes form any part of the Act; nor can they be looked at for the purpose of constructing the Act.—*N.* § 767.

391. Clauses are separate, and substantive or dependent. Provisos are always dependent. Clauses may support, explain, or restrain each other, and provisos may narrow previous clauses.—*Ib.* 768.

392. The following are the chief maxims for construction which are equally (and indeed more) applicable to all documents as to statutes.

1) When the provisions of a later statute are opposed to those of an earlier, the earlier statute is considered as repealed.—*B. L. M.* 26.

2) A Legislature enactment ought to be prospective, not retrospective, in its operation on the principle of obvious convenience and justice. (*Ib.* 33). Thus the Act XXI of 1850, which declares "that no person shall forfeit his rights of property by reason of changing his religion," could not avail a Hindoo who changed his religion before the passing of the Act; and was, of course, liable under Hindu Law to the forfeiture of his inheritance.—*S. D.*, p. 250 of 1858.

3) Construction should be liberal on account of the ignorance of the unprofessional, so that the object may be attained rather than destroyed. Poisonous is that construction which corrupts the words of the text. It is the province of the Judge to declare, not make the law. It is not the duty of the Judge to speculate upon what may be the best in his opinion for the advantage of the community.—*N.* § 748.

4) A man ought not to rest upon the letter only, but rely upon the sense; the one is the rind, the other the kernel.—*Ib.*

5) A passage will be best interpreted by reference to that which precedes and follows.—*B. L. M.* 513.

6) The meaning of a word may be ascertained by reference to the meaning of words associated with it.—*Ib.* 528.

7) The words of an instrument shall be taken most strongly against the party employing them.—*Ib.* 529.

8) In the absence of ambiguity no exposition shall be made which is opposed to the express words of the instrument.—*Ib.*

9) That is sufficiently certain which can be made certain.—*Ib.* 555.

10) Surplusage does not vitiate that which in other respects is good and valid.—*Ib.* 559.

11) Mere false description does not make an instrument inoperative.—*Ib.* 562.

12) General words may be aptly restrained according to the subject-matter or person to which they relate.—*Ib.* 575.

13) The express mention of one thing implies the exclusion of another.—*Ib.* 581.

14) The expression of what is tacitly implied is inoperative.—*Ib.* 596.

15) Words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them.—*Ib.* 599.

16) Relative words refer to the next antecedent, unless by such a construction the meaning of the sentence would be impaired.—*Ib.* 608.

17) The best and surest mode of expounding an instrument is by referring to the time when, and circumstances under which, it was made.—*Ib.*

18) He who considers merely the letter of an instrument goes but skin-deep into its meaning.—*Ib.* 611.

19) If technical terms are used (in a Treaty) they must be taken in their technical sense; as, the word "Heirs" must receive its ordinary technical construction of *heirs general* and not to heirs male.—*N.* § 752.

The word "*Descendants*" would include children and grandchildren, but it will not include brother or widow. (*I. H. C. R.*, p. 400, 101. n.)

20) Words may be transposed or read parenthetically, *but they cannot be imported* for the purpose of making sense.—*N.* § 753.

21) Affirmative words do not take away a privilege (such as the right of appeal) which belongs to every subject by common law: it must be expressly negatived.—*Ib.* 760.

22) Construction must be made on the entire instrument, and that one part of it do help to expound another, and that every word (if it may be) may take effect, and none be rejected, and all the parts do agree together, and there be no discordance therein.—*Ib.* 769.

23) To cavil about the words in subversion of the plain intent of the parties is a malice against justice and the nurse of injustice.—*Ib.*

24) A man ought not to rest on letter only, but he ought to rely upon the sense which is the fruit, whereas the letter is but the shell.—*Ib.*

25) The office of a good expositor is to make construction on all the parts together of an instrument, and not of one part only by itself.—*Ib.*

26) Bad Orthography or Grammar does not vitiate a grant. Singular number cannot be applied instead of the plural, nor the plural instead of the singular.—*Ib.*

27) Construction must be made in suppression of the mischief and in advancement of the remedy.—*Ib.*

28) The great principle of interpretation of all instrument seems to be that effect is to be given to the intention of the framers, rather than that the instrument shall be void.—*Ib.* Thus : if by one construction of a document it would be illegal, by another not, the latter shall prevail.—*Ib.* So if by one reading it would operate as a forfeiture by another not, the latter shall prevail. A party cannot indeed without very strongest evidence be supposed to intend to contravene the rules of law, or to create the forfeiture.—(*B. L. M.* 486. *w.*) If certain parties join in a deed, some of whom are capable and others not, the deed shall not be altogether void, but shall bind those who are capable. So where a bond may be construed either as joint or several, it shall be taken to be joint or several, according to the intention of the parties. So where there is on the face of a Will a particular intention of the testator, which cannot be carried out, and also a general intention which can, the latter shall have effect.—*N.* § 770.

Where divers persons join in a deed, some of whom are able to make such deed and others are not, this shall be said to be his deed alone that he is able.—*B. L. M.* 485.

Where a deed cannot operate in the precise manner or to the full extent intended by the parties, it shall nevertheless be made as far as possible to effectuate their intention.—*Ib.*

The Court will endeavour to affix such a meaning to words of obscure and doubtful import occurring in a deed, as may best carry out the plain and manifest intention of the parties, as collected from the four corners of the instrument.—*Ib.*

The Courts will not introduce into a deed words which are not to be found there, nor strike out of a deed words which are there, in order to make the sense different.—*R.* 486.

Ambiguity.

393. Ambiguities are of two kinds. The one appearing upon the instrument itself, and the ambiguity by the inherent vice or defect of the language used; it is patent to all the world, and therefore it is called *Patient Ambiguity*, as where in a Will an estate is left to—.

394. The second kind, however, would not be apparent to any indifferent reader unacquainted with the facts; and though the language used is unambiguous, it may fit several conditions of fact equally well. Here, the ambiguity is concealed: its source is extrinsic to the document, and it is called a *Latent Ambiguity*. For instance, if a testator having *two* estates named “Blackacre” leaves his estate Blackacre to “A. B.” or leaves his estate “Whiteacre” to his Cousin William “he in fact having two cousins named William.”—*N.* § 632.

395. Latent ambiguity may be supplied by evidence; for an ambiguity which arises by proof of an extrinsic fact may in the same manner be removed, but parol evidence is never admitted to explain a patent ambiguity. Thus in the case, put of a Will, bequeathing an estate to—, the blank can never be supplied by parol evidence: for, intention is not to be gathered from slippery reminiscences, independent of the expressions used, but from the expressions themselves.—*Ib.* 633.

Of Covenant.

396. It is not necessary, in order to charge a party with a covenant, that there should be express words of Covenants or Agreements, but is enough if the intention of the parties to create a covenant be apparent. Where, therefore, words of recital or manifest a clear intention that the parties shall do cer-

tain acts, the Courts will from these words infer a covenant to do such acts, and will sustain action of covenant for their non-performance as effectually as if the instrument had contained express covenants to perform them.—*B. L. M.* 487.

397. Although, where the words of a covenant are clear and free from doubt, effect must be given to them; yet, if “a covenant may have two meanings, each of which is equally probable in each of the words, or capable of expressing the same thing, and the question is in which of two senses it is to be understood, that meaning which it is most probable the parties contemplated is the one that is to be adopted.”—*B. C.* 489.

398. The construction of covenants is the same in equity as at law, but it is most certain the performance may differ in the one Court from what it is in the other. At law a covenant must be strictly and literally performed according to the true intent and meaning of the parties, so far as circumstances will admit; but if, by unavoidable accident,—if by fraud, by surprise or ignorance, not wilful, parties may have been prevented from executing it literally, a Court of Equity will interfere, and will give relief.—*Ib.*

399. So in the case of *Nursinga Rye v. Vasoo Naik*, it was the express term of a mortgage that the mortgagee should hold possession until “he should be himself desirous of receiving from the mortgager the amount advanced on the mortgage.” The Court of Sudder Udalt held (*S. D.*, p. 39 of 1861) that such terms are opposed to the principle of equity, and ordered the land to be restored to the mortgager on payment of the mortgage money.—*See also Decree passed by me in the case of Hareygod Munjoo Shetty and H. Subraya.*

400. A Court of Equity also looks to the general intent of a deed and will give it such a construction as supports that general intent, although a particular expression in the deed may be inconsistent with it. (*B. L. M.* 514.) A case was decided in the Mangalore Civil Court, in which a Mokteary was given by a Musulman daughter to her father. Indeed, the object of this deed was simply to manage her property on her behalf; but the father taking advantage of an expression therein made, “I give you all my right without any reserve,” sold the property to a third person. But the Civil Judge (Mr. Chatfield) very properly cancelled the sale and awarded the land to the daught

tion was also supported by the opinion given by Canzee Oolkoozath of Sudr Udalut.—*Decree of Civil Court in A. S. No. 221 of 1861.*

Of Contracts between Landlord and Tenants.

401. It is a general rule, that if a doubt arises as to the construction of a lease between the lessor and lessee, the lease must be construed more beneficially for the latter.—*B. L. M. 530.*

402. Where there is any reasonable degree of doubts as to the meaning of an exception in a lease, the words of exception being the words of the lessor, are to be taken most favourably for the lessee and against the lessor.—*Ib. 531.*

403. In a *summary* case, the terms of the lease were that "Cash, Straw, Vegetables, and Betle leaves are to be delivered within a given period," and the concluding clause ran that "if the *rent* were not so paid, the lease were to be forfeited." "This concluding clause," observed Mr. Chatfield, "leaves a doubt as to the intention of the proprioritor, and the Court considers the tenant entitled to the benefit of the doubt, however slight it may be."—*Ib. (M. P. No. 811 of 1859.)*

404. A stipulation in a lease that on the tenant's failing to pay the rent, the landlord should be at liberty to resume the land in lieu of rent, was held to refer only to future rent and not to arrears.—*S. D., p. 21 of 1858.*

405. A permanent lease will not become null and void upon the tenant's falling into arrears of his rent, unless there be an express condition to that effect.—*Ib. 275 of 1859. Vide also I. H. C. R., p. 15.*

406. But in the absence of any express terms in the lease, showing to be permanent, it is to be presumed to be a lease for a year and terminable after that period at the will of the landlord.—*Ib. 161 of 1858.*

407. A landlord, under the Regulation, cannot arbitrarily eject a tenant who is fulfilling the condition of his lease.—*Ib. 22 of 1859.*

Of Contracts.

408. A contract must be read according to what is written by the parties, for it is a well-known principle of law that a written contract cannot be altered by parol. If A and B make a
writing evidence is not admissible to show that A

meant something different from what is stated in the contract itself, and that B at the time assented to it. If that sort of evidence were admitted, every written document would be at the mercy of witnesses who might be called to swear anything.—*B. L. M.* 542.

409. For this reason parol evidence is never admissible to show that the agreement was in reality different from that which it purports to be. Such instrument is always to be construed according to the strict, plain common meaning of the words themselves, and evidence for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible.—*B. L. M.* 553.

Of Commercial Transaction.

410. In commercial transactions, extrinsic evidence of custom and usage is admissible to any incidents to written contracts in matters with respect to which they are silent. "Usage is the best interpreter of things."—*B. L. M.* 590.

411. The same rule applies to contracts in other transactions of life, specially to those between landlord and tenant.—*Ib.*

412. Every demise between landlord and tenant, in respect of matters to which the parties are *silent*, may be fairly open to explanation by the general usage and custom of the country, or of the district where the land lies; for all persons, under such circumstances, are supposed to be cognizant of the custom, and to contract with a tacit reference to it.—*Ib.*

413. However such evidence of custom or usage is admissible to *annex* incidents to a written contract, but it can, in no case, be given *in contravention* thereof.—*Ib.*

Of Wills.

The Hindu Law of Madras admits of testamentary disposition of property, whether ancestral or self-acquired. The testamentary power is co-extensive with his independent right of alienation, *inter vivos*. Such wills would not be invalidated merely by its omitting to provide for his widow. (*I H. C. R.*, p. 326.)

English wills may have to be adjudicated on in Mofussil Courts, or advised on by Mofussil Pleaders; and hence it may be useful to give the general rules of the law which prevail for the construction of English wills. Some of these rules are of a technical character; others are not applicable to other than English wills:

but as a body these rules convey sound principles of construction for written instruments in general."—N. 636 (E.)

Rules.

1) That a will of real estate, wheresoever made, and in whatever language written, is construed according to the law of England, in which the property is situate, but a will of personality is governed by the *lex domicilii*.

2) That technical words are not necessary to give effect to any species of disposition in a will.

3) That the construction of a will is the same at law and in equity, the jurisdiction of each being governed by the nature of the subject; though the consequences may differ, as in the instance of a contingent remainder, which is destructible in the one case and not in the other.

4) That a will speaks, for some purposes from the period of execution, and for others from the death of the testator, but never operates until the latter period.

5) That the heir is not to be disinherited without an express devise, or necessary implication; such implication importing, not natural necessity, but so strong a probability, that an intention to the contrary cannot be supposed.

6) That merely negative words are not sufficient to exclude the title of the heir or next of kin. There must be an actual gift to some other definite object.

7) That all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but, where several parts are absolutely irreconcilable, the latter must prevail.

8) That extrinsic evidence is not admissible to alter, detract from, or add to, the terms of a will, (though it may be used to rebut a resulting trust attaching to a legal title created by it, or to remove a latent ambiguity).

9) Nor to vary the meaning of words; and, therefore, in order to attach a strained and extraordinary sense to a particular word, an instrument executed by the testator, in which the same word occurs in that sense, is not admissible; but the

10) Courts will look at the circumstances under which the

devisor makes his will as the state of his property, of his family, and the like.

11) That, in general, implication is admissible only in the absence of, and not to control, an express disposition.

12) That an express and positive devise cannot be controlled by the reason assigned, or by subsequent ambiguous words, or by inference and argument from other parts of the will; and accordingly, such a devise is not affected by a subsequent inaccurate recital of, or reference to, its contents; though recourse may be had to such reference to assist the construction, in case of ambiguity or doubt.

13) That the inconvenience or absurdity of a devise is no ground for varying the construction, where the terms of it are unambiguous; nor is the fact that the testator did not foresee all the consequences of his disposition, a reason for varying it: but, where the intention is obscured by conflicting expressions, it is to be sought rather in a rational and consistent, than an irrational and inconsistent purpose.

14) That the rules of construction cannot be strained to bring a devise within the rules of law; but it seems that, where the will admits of two constructions, that is to be preferred which will render it valid: and therefore the Court, in one instance, adhered to the literal language of the testator, though it was highly probable that he had written a word by mistake, for one which would have rendered the devise void.

15) That favor or disfavor to the object ought not to influence the construction.

16) That words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, and that other can be ascertained; and they are, in all cases, to receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative; and of two modes of construction, that is to be preferred which will prevent a total intestacy.

17) That, when a testator uses technical words, he is presumed to employ them in their legal sense, unless the context clearly indicates the contrary.

18) That words, occurring more than one in a will, shall be presumed to be used always in the same sense, unless a contrary

intention appear by the context, or unless the words be applied to a different subject. And, on the same principle, where a testator uses an additional word or phrase, he must be presumed to have an additional meaning.

19) That words and limitations may be transposed, supplied, or rejected, where warranted by the immediate context, or the general scheme of the will: but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument.

20) That words which it is obvious are miswritten (as dying *with* issue, for dying *without* issue), may be corrected.

21) That the construction is not to be varied by events subsequent to the execution; but the Courts, in determining the meaning of particular expressions, will look to possible circumstances, in which they *might* have been called upon to affix a signification to them.

22) That several independent devises, not grammatically connected, or united by the expression of a common purpose, must be construed separately and without relation to each other; although it may be conjectured, from similarity of relationship, or other such circumstances, that the testator had the same intention in regard to both. There must be an apparent design to connect them.

23) That where a testator's intention cannot operate to its full extent, it shall take effect as far as possible.

24) That a testator is rather to be presumed to calculate on the dispositions in his will taking effect, than the contrary; and accordingly, a provision for the death of devisees will not be considered as intended, to provide exclusively for lapse, if it admits of any other construction.—N. § 636. (E).

CHAPTER X.

Law of Evidence.

415. At the present day the English Law of Evidence is the guide in the Courts of the Mofussil, with such exceptions as circumstances necessitate, which will be noticed in due course. (N. § 23, K. § 4.) In India, the Judges are Judges both of Law and Equity, and they may exercise equitable jurisdiction.—N. § 18, 94, 650, & 648 (a).

416. In conducting the judicial investigation, a Judge should be open to no information in his cases, *before* they come to him legitimately in open Court. Hints conveyed by Court servants should be imperatively rebuked. Ninety-nine times out of a hundred the crafty insinuator has his own ends to gain by the practice. Anonymous petitions, petitions received through the channel of the public post, and private petitions, should be returned unopened : or opened and read by the public officer in Court. Friends of the Judge or of the parties should be checked if they ventured to discuss the merits of an untried case. The mind of the Judge should be kept like a sheet of blank paper to receive only the impressions produced by *the evidence*.—N. § 845 (y), and C. O. S. U., 21st Oct. 1825.

417. Judicial investigation must be of the purest possible quality, viz., (N. § 40), First. The evidence shall be delivered under the sanction of an *oath* or that which is equivalent to it, solemn affirmation. Secondly. The party to be affected by such evidence must have an opportunity of cross-examination.

418. It is not essential that cross-examination should actually have taken place. It is sufficient if the party to be affected by it has had the opportunity of cross-examining the deponent.—*Ib.*

419. The general rule is, that the evidence shall be confined to the point in issue. (K. § 6.) It is not necessary to prove, 1. What the Court is bound to take judicial notice of ; 2. What is admitted by the opposite Pleading ; 3. What the opposite Pleader

may admit in Court or beforehand by agreement for the purpose of trial.—*N.* § 598.

Collateral Evidence.

420. No evidence is admissible as to collateral acts or irrelevant circumstances on the ground of general convenience.—*Ib.* 68.

421. Collateral evidence is that which is too remote to throw light upon the issue, viz., 1. A custom in one parish or village is no evidence of a similar custom in the one adjoining. 2. The fact that the defendant represented herself to several tradesmen as an unmarried woman, is not evidence to prove that she so represented herself to the plaintiff. 3. So, too, on an indictment for stealing the property of A, and also receiving the property knowing it to have been stolen, evidence of possession by prisoner of other property stolen from other persons at other times, is not admissible to prove either the stealing or the receiving. 4. So in an action for not supplying the plaintiff with good beer, the defendant could not show that he had supplied other parties with good beer. (*N.* § 602.) 5. So again with respect to the character of a witness; where a witness is asked as to his character, his answer, even if a denial, is binding, and evidence cannot be called to contradict it. But to this ruling there is one exception, as stated in § 36.

422. But when collateral facts may tend to throw light on a point in issue, they may be proved by evidence, (*K.* § 12.) Whether such a fact is material, or is so completely collateral as to be entirely beside the issue, is a question which it is the province of the Judge to decide; and this is often a question of great nicety. Where a Pleader offers in evidence a fact which is apparently collateral, it is frequently admitted, on his pledge or undertaking, that he will subsequently show its relevancy. Because the Judge does not know the details of proof by which the Pleader seeks to establish his case; whereas the skilful Pleader proceeds on some pre-determined plan of action; and thus it may happen that the bearing of a fact may not strike the Judge at the moment of its introduction, notwithstanding its relevancy may become afterwards apparent, in connection with facts subsequently proved. Hence credit is given to the Pleader; but he must be cautious not to abuse his trust, and if he fails to redeem his pledge the evidence already received ought to be struck out of the record; at any rate, it should not be allowed any influence when the Judge is considering the weight of evidence.—*N.* § 605.

423. Evidence as to the general character or reputation of a witness for speaking the truth is receivable because the question can never be immaterial to the issue.—*K*, § 8.

424. Evidence of the general reputation of parties is generally receivable only where the question of character is in issue. In certain civil actions for damages, as for libel, &c., the character of the plaintiff may be considered in determining the amount of damages; and in prosecutions for rape or seduction, the previous character of the female for chastity is often a relevant enquiry, though it appear to raise a collateral issue, for it may affect the probability of the offence having been committed. It is a general rule that in an enquiry as to character, evidence of particular facts is inadmissible; so on a charge of rape it may not be proved that the female has had connection with other men; though it was allowed in Robin's case.—*K*, § 9.

425. A prisoner, on his trial for any crime or misdemeanour, may always call witnesses to his general character; but where the object of the prosecution is not the punishment of crime but merely the enforcement of some penalty, as for keeping false weights, selling liquor without a license, and such trifling offences as involve no question of character, evidence of character of the prisoner is rejected as irrelevant. Where there is any room to doubt the prisoner's guilt, evidence to his good character will be of service; but not generally where his guilt is clear.—*Ib*. 10.

426. The prosecutor is not generally permitted to prove the prisoner to be of a bad character, unless the prisoner has cited witnesses to establish his good character.—*Ib*. 11.

427. An enquiry should bear some reference to the nature of the charge. On a charge of stealing, it would be irrelevant and absurd to enquire into the prisoner's loyalty or humanity; on a charge of high treason, it would be equally absurd to enquire into his honesty and punctuality in private dealings.—*Ib*. 12.

428. In all questions of character, the evidence must be confined to the general reputation of the person, as that he is commonly reported honest, &c.; the witnesses should not speak of their own experience of the person's conduct, and, above all, particular facts are not to be mentioned, as such evidence is inadmissible.—*Ib*. 13.

429. Collateral facts are also admissible in evidence to prove guilty knowledge, malice, or intent; (*Ib*. 15), thus—

1) Where the prisoner is charged with maliciously shooting at A, evidence of the prisoner having shot at the prosecutor a quarter of an hour before the shooting with which he is charged was receivable.—*N.* § 608.

2) To show the intent on a charge of murder of a fisherman, evidence was received that the prisoner shot at other fishermen on previous occasions.—*K.* § 16.

3) So on a charge of sending a threatening letter, other letters of similar character sent by the prisoner are admissible.—*N.* § 608.

4) So on an action for libel, other libels may be proved to show the *animus* of the defendant.

5) On the same principle, former menaces, old grudges, former enmities or threatening, &c., may be proved against the prisoner on a charge of murder, (*Ib.*); or on the other side it may be proved that he had shown kindness to the injured person.—*K.* § 17.

6) In case of conspiracy, the acts and declarations of other conspirators are admissible.—*Ib.* 18.

Privileged Communication.

430. The law further interferes to prevent the reception of privileged communication upon the ground of public policy.—*N.* § 69.

431. A communication may be said privileged when made *bonâ fide* by any party in the performance of some public or private duty, whether legal or moral; or in the conduct of his own affairs and with a fair and reasonable hope of protecting his own interest in a matter where it is concerned.—*B. C.* 753.

432. Communications made between husband and wife during their marriage shall be deemed privileged, and shall not be disclosed without the consent of the persons making the same, unless such communication shall relate to a matter in dispute in a suit pending between such husband and wife. But the communication must have been made *during their marriage*; and therefore the protection would not extend to any communication made *before marriage*. The privilege would continue in force after the marriage had been dissolved by death or divorce.—*K.* § 295.

433. Communication between client and legal adviser, with reference to his professional employment on behalf of the client,

cannot be disclosed unless the party shall have offered himself as a witness.—*K.* § 299.

434. The privilege is not extended to confidential communications made to Clergymen, Medical men, Clerks, Agents, or friends, nor to letters between parties, nor to letters written by or to a party with a view to their being submitted to a legal adviser. Nor to the following cases ; where the communication was made to the legal adviser before he was so employed (though it is not necessary that any fee should have been given), or after his employment had ceased ; or where he was consulted only as a friend, or where the communication had no reference to the professional employment of the legal adviser, or was unnecessary, as where a client observed to his Attorney that he would give a large sum to have the prisoner hanged ; or where, by attesting an instrument executed by his client, the legal adviser becomes liable to be called on to prove its execution. But it seems that in this last case the legal adviser cannot be required to state any circumstances attending the previous concoction, or preparation, or subsequent destruction of the instrument, which may have come to his knowledge from his confidential position as a professional man.—*Ib.* § 301.

435. So an Attorney or Vakeel may give evidence of any fact, such as the existence of an entry or of any erasure in a document, which may have come to his knowledge, not by the communication of his client, but by his own observation during the trial. He may also be compelled to disclose the name of his client, and to identify him or his hand-writing ; or, for the purpose of admitting secondary evidence, to state whether a document, which he may have obtained from his client, is in his possession or not. So also he must disclose all communications which he may have made to, or received from, the opposite party on behalf of his client.—*Ib.* 302.

436. The privilege is extended to Interpreters, Agents, and other persons, through whom the communications between the client and his legal adviser must necessarily pass ; also to the Clerks or local Agents employed by the legal adviser.—*K.* § 303.

437. The privilege once existing does not terminate with the close of the connection between the client and his adviser, but remains even after the death of the client, unless removed by him or by his personal representative. This, however, does not apply

to cases occurring after the death of the client in which the dispute lies between two parties, each of whom claims to be the representative of the original client.—*K.* 304.

438. Judges are not compellable to testify as to matters in which they have been judicially engaged; so also Arbitrators or Jurors cannot be examined as to the grounds of their award, unless indeed where fraud is alleged.—*Ib.* 305.

439. State secrets are also, on the ground of public policy, not to be disclosed. Official transactions between the heads of the departments of Government and their subordinate officers are in general treated as secrets of State. (*N.* § 355.) So also letters addressed to Government officially are not producible without the consent of Government. This objection may be taken on behalf of Government by a Collector. (*Ib.* 356.) This policy also prohibits the admission of secondary evidence of the contents of official communications between official persons.—*Ib.* 307.

440. A witness need not produce his own title deeds to land, and it seems that trustees and mortgagees cannot be compelled to produce the title deeds of those who have entrusted them, or of the mortgagers, nor to give secondary evidence of the contents of such documents.—*Ib.* 303.

441. Lastly, the law does not generally exclude, on the ground of its indecency, any evidence which may be necessary for the purposes of criminal or civil justice; but it will not permit such evidence to be unnecessarily and wantonly produced; as in cases where wagers have been made as to the sex of any person, or as to whether a woman has had a child; and, on the same ground of indecency, when the legitimacy of a child is in dispute the parents may not be asked whether they have had connection.—*Ib.* 309.

442. As regards an ordinary Agent, his communications with his principal may be disclosed.—*N.* § 348.

Quality of Evidence.

443. The general rule is that "the best evidence which the case admits of shall in every instance be produced." (*N.* § 39.) Here it is very important to distinguish clearly between evidence which is inadmissible and that which is incredible.—*K.* § 125.

444. Inadmissible evidence is that which the law will not admit, or, in other words, will not allow to be produced, and if

accidently taken, will be struck out of the record and treated as a nullity.—*Ib.* 126.

445. On the other hand, evidence may be admissible and yet incredible ; in which case the Court will not refuse to listen to it, though it be unworthy of belief, or credit.—*Ib.* 127.

446. The expression "best evidence" does not mean the most convincing, nor the most credible ; for of several eye-witnesses to a fact, a party may produce whichever he pleases, and the Court will not refuse to listen to them on the ground that a more credible witness might have been cited. The absence of a more credible witness might affect the credit of the evidence produced, but not its admissibility.—*Ib.* 129.

447. A copy of a deed cannot be received until the absence of the original is satisfactorily accounted for.—*N.* § 39.

448. When a transaction may be proved by evidence of one who was present and took part in it, it is not sufficient to leave it to be inferred from collateral circumstances.—*K.* § 131.

449. Generally speaking, no evidence shall be received which shows on its face that it only derives its force from some other which is withheld.—*Ib.* 132.

450. The depositions are not evidence when deponents are alive and can be produced.

451. A written document affords the best evidence of its own contents, and the contents must be taken from the paper, which will speak for itself, not from a copy or the treacherous memory of men speaking for it.—*N.* § 622.

452. Where a bond is in its terms absolute, parol evidence cannot be admitted to show that it was intended to be conditional or to operate merely as an indemnity.—*Ib.*

453. Where a contract has been reduced to writing, the instrument is regarded as a record of final intention and agreement of the contracting parties, and the terms of their contract shall be taken from the record which they have themselves appointed, not from parol testimony of what the parties said or intended.—*Ib.* 622.

Kind of Evidence.

454. Evidence is divided into *direct* and *indirect*. Direct evidence is again divided into *immediate*, and *mediate* or hearsay.

455. When a witness declares "I saw A kill B with a sword," or "I heard such and such a statement made by the plaintiff or defendant, or the prisoner," this is direct evidence.—*Ib.* 109.

Mediate or Hearsay Evidence.

456. This class of evidence is generally not receivable; for such testimony is neither delivered on oath, nor is the originator subject to cross-examination.—*Ib.* 64.

457. When A, sworn in Court, details something which he did not see with his own eyes *immediately*, but which he *heard* from B *mediately*, he is not giving expression to the evidence of his own bodily senses, but is the *medium* merely of communicating that which some third unsworn person, B, has said he saw. He is bringing evidence to birth, *obstreticant manu*, as it has been called, with the hand of a midwife; and is a mere channel or conduit pipe for communicating the information of a party not before the Court. A, may most truthfully and correctly report what has been related to him; but it is nevertheless apparent that the real truth of the original statement cannot, under such circumstances, be tested. B, the originator of the report, is not subjected either to an oath or to cross-examination. *Non constat* but that he may have spoken idly or jocularly, and that he would be unwilling to repeat on oath what he had not hesitated to narrate in ordinary conversation: *non constat* that he might not have wilfully fabricated a story, or been the dupe of some one still farther hid behind the scenes; or that, though perfectly veracious as to intention, he might not have been the victim of his own faulty impressions or unretentive memory; and so have utterly broken down, if only exposed to the test of cross-examination. Therefore the law determines that such evidence shall not be receivable; that if it is important to the party calling A, to establish the facts which A, has heard from B, B, himself shall be produced, make his own statement in Court, be subjected to the two tests of oath and cross-examination, and that scarcely less terrible detector of inaccurate or fallacious evidence, the observation to which a Judge, experienced in forensic practice and skilled in the knowledge of human nature, subjects the demeanour, the deportment, the manner

of every witness who comes before him. And though it may occasionally happen that the evidence of B is not procurable by the party without any fault of his own, and in the absence of any hindrance by his antagonist, it is better that the individual should suffer inconvenience, and even loss, than that the general rule should be broken in his favor, the dangers to which such a breaking in upon the general rule would open the door being manifest and important.—*N.* § 65.

458. There are, however, certain cases in which hearsay evidence is in its nature original. viz. :—

1) Where public reputation or opinion is to be proved.—*Ib.* 114.

2) Where it relates to impressions produced upon an aggregate of minds.—*Ib.* 115.

3) Where expressions have been used by an individual.—*Ib.* 117.

4) Where it is material to prove the terms on which husband and wife lived before action for *crim. con.*—*Ib.*

5) Where expressions of bodily health, pain, and sensations have been used.—*N.* § 113.

6) Where complaints have been made of injury in cases of rape.—*Ib.* 119.

7) When declarations form part of the facts of a transaction.—*Ib.* 120.

8) In cases in which sayings, acts, &c., of conspirators are concerned.—*Ib.* 121—123.

459. Mediate or hearsay evidence is also admissible in the following cases :

- 1) Admissions made against interest by a party to a suit.
- 2) Confessions.
- 3) Matters of public or general interest.
- 4) Pedigree, relationship, or affinity.
- 5) Ancient possession.

6) Declarations or entries made against interest by third parties.

7) Declarations or entries made in the course of business.

8) Dying declarations.

460. It may be stated generally that, except in the abovementioned cases, hearsay evidence is not receivable.—*N.* § 128.

1. Admission.

461. The first rule is that where an admission is offered in evidence, the whole of it must be submitted to the Judge.—*Ib.* 203.

462. Admissions made against his own interest by a party to a suit, his partner or agent, or by any through whom he may claim, are receivable as evidence against that party. Such admissions may appear in the pleadings, or they may have been made orally or in writing on other occasions.—*K.* § 151.

463. But the admission of a partner or agent will not be admissible in evidence unless the fact of partnership or agency be first proved by independent evidence, for which purpose it is not sufficient that the person who made the admission admits the partnership or agency.—*K.* § 158.

464. It is also essential that the declaration of an agent should be within the scope of his authority. A special agent for a particular purpose or occasion cannot bind his principal as to matters in general, or not arising out of that for which his agency was constituted.—*N.* § 223.

465. So the declaration of a partner to be binding on his co-partner must be one made concerning their joint business. But the misrepresentation of a fact in such joint business, made by one partner to a third party, will be evidence against the other members of the firm, though not parties to the misrepresentation.—*Ib.*

466. Of course, if such statement has been made in fraud of the co-partners, and in collusion with the opponent, it is not binding, and the evidence will not be receivable.—*Ib.* 224.

467. The admission of a person identified in interest with the party to the record is receivable against the latter.—*Ib.* 218.

468. But the admission of a guardian is not evidence : because they are usually *nominal parties*, and, as it were, officers of the

Court, for the purpose of representing those unable to sue in person.—*Ib.* 219.

469. Admissions by *privies*, as they are called, are equally receivable with admission of the parties themselves to whom they are privies.—*Ib.* 220.

470. Privies are of three classes, viz. :—

1st.—*In blood*—as heirs and ancestors, &c.

2nd.—*In estate*—as donor and donee, lessor and lessee, executors and testators, and administrators and the intestates.

3rd.—*Privies in law*—are those upon whom the law casts a privy, as where land escheats to a third party in failure of heirs.—*Ib.* 221.

In these cases the declarations of privies are in their respective grades binding upon their representatives.—*Ib.* 222.

471. The admissions of a wife will bind her husband only where she had authority from him to make them.—*N.* § 226.

472. The answer made by one defendant is not evidence against the other.—*K.* § 151.

473. It is, of course, necessary that an admission should have been made *against the interest* of the party who made it, otherwise it will not be admissible in evidence. And an admission obtained by constraint, fraud, or misrepresentation, or made under a mistake as to facts, would be equally inadmissible; and accordingly an admission obtained in a lower Court from a party who appeared personally, and was unduly pressed by the Judge, was treated as null.—*N.* § 161.

474. Neither are admissions made during confidential overtures for pacification, arbitration, or settlement of disputes receivable; in short, no admissions which are made with a view to what is called the “purchase of peace,” for a party may often be willing to concede a point on such occasions, even against his own convictions, which he would by no means admit, but for the hope of thus avoiding further controversy.—*Ib.* 235.

475. A letter headed with the words “without prejudice” and containing an admission, cannot be on evidence either for, or against, the party writing it.—*K.* § 162.

476. Admission of Vakeels on the record bind their clients in all matters relating to the progress and trial of the cause; but such admissions should be distinct and formal; not those of mere conversation.—*N.* § 227.

477. A Vakeel has not, by the mere relationship between himself and his client, a general power to bind his client by agreement to a compromise; which is a *sale* of the subject-matter of the suit from one party to the other.—*Ib.* 228.

478. An admission and consent of a Vakeel made with due authority will bind his client though *not present* at the time of making it.—*Ib.*

479. How far a party may be bound by admission of his Pleader will be for the consideration of the Judge, who, of course, is bound to take care that he does not burthen the record by calling for proof of facts which are really not in dispute between the parties.—*N.* § 229.

480. A party may be bound by his own conduct during the progress of the cause. The commonest form of this perhaps is that of payment by the defendant of a certain sum into Court, to which extent he thereby admits his liability. The suppression of the documents is an implied admission that their contents are unfavorable to the suppressor.—*Ib.* 230 and 231.

481. All *verbal* admissions are to be received with great caution, for such statements are subject to much imperfection and mistake. The party may have been misinformed, or he may not have clearly expressed his meaning, or the witness may have misunderstood him. It frequently happens also that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually said. But where the admission is deliberately made, and precisely identified, the evidence it affords is often of the most satisfactory nature.—*Ib.* 233.

482. The following are rulings of the late Sudder Udalt on admission :—

1) An admission of a Hindu father is binding on his sons.—*V. D.*, p. 1.

2) But the admission of a *Karnavan* is not binding on the family. (*Ib. S. D.*, p. 17 of 1855.) This suit was for equity of re-

demption. The Mufty attached credit to the mortgage bond of 1803, on the strength of defendant's Exhibit 14 which was a copy of an appeal petition filed by plaintiff's Karnavan and the Karnavan of the defendant jointly in 1824, and wherein it was represented that the land in issue had been mortgaged to the latter in the year 1803. On appeal, the Sub-Judge declared himself unable to allow validity to the said Exhibit 14, which, he observed, contained a mere assertion made by certain parties in preferring an appeal, but which had never been adjudicated on. The Court of S. U. also were of opinion that it would not be safe to act upon the statement therein appearing, which might have been an unfounded one, advanced for the purposes of the litigation then pending.

3) Conditional promise to pay, made to evade importunity, and to recover vouchers withheld, is not binding.—*V. D.*, p. 1.

4) Confirmation, after majority of an admission made during the minority, is binding.—*Ib.*

5) A party is bound by any admission made before a Revenue Officer, though the deposition may not have been given upon oath.—*S. D.*, p. 27 of 1860.

6) A Razeenamah presented to a Panchayet, not convened in accordance with any express regulation, cannot bind the parties to it, but it will operate as an admission respecting the facts recited in it.—*Ib.* 26, p. 168.

7) When a bond is fraudulent, effect cannot be given even against him who admits it.—*S. D.*, p. 88 of 1862.

2. Confessions.

483. Where there is any reason to suppose that the confession has been made in consequence of any promise, or threat, proceeding from any person in authority, proof must be given to the contrary before the confession can be received in evidence. In such cases not only Public officers, Surgeons, Jailors, and Peons, but even Masters and Mistresses are taken to be persons in authority, provided, in the case of a Mistress, that she manages the house. So, where a Mistress said to her servant-maid, who was charged with murder; "If you are guilty, do confess; it will perhaps save your neck;" the confession so obtained was not admitted.—*K.* § 165.

484. Where a person in authority has told the prisoner that it would be better for him to confess, or worse for him if he did not confess, a confession consequently made, would not be admissible. (*Ib.* 166.) But a promise or threat referring only to the forgiveness of God, or to the reward or punishment which the prisoner might expect in another world, would not invalidate a confession.—*K.* § 166.

485. If a prisoner, on his apprehension, is told that he is apprehended on a particular charge, and is improperly induced by a promise or threat proceeding from some person in authority to confess to that charge, and if he then confess another offence of which he was not suspected, his confession of that other offence with which he was not charged will be admissible when he comes to be tried for it. But not so if the prisoner had not been informed of the particular charge against him.—*Ib.* 167.

486. A confession made on an inducement held out by a person without authority, but in the presence of a party who has authority, and who gives no caution, and expresses no dissent, is inadmissible in evidence. But in any other case a threat or promise made by a person having no authority or control over the prisoner, nor any power to enforce the threat, or to fulfil the promise, would not render the confession consequently made inadmissible.—*Ib.* 168.

487. In some cases the effect of the promise or threat has been held to have ceased before the confession was made, on which ground the confession has been admitted; as where, after the promise or threat the prisoner has been warned by a Magistrate, or other person in authority, that whatever he says might be used against him at the trial. So where the inducement to confess was the promise of the prisoner's mistress that she would not send for the constable, the inducement was held to have ceased after the constable came and took the prisoner away, and a confession afterwards made to the constable was admitted.—*Ib.* 169.

488. Where a confession has been obtained by artifice or deception, but without the use of promises or threats, it is admissible. So confessions have been admitted in each of the following cases; as where the prisoner was led to believe that some of his accomplices were already in custody; and where a constable, assuring the prisoner's guilt, asked her how she came to poison her uncle;

and where the confession was contained in a letter which an officer of the jail had deceitfully promised to post. So also where it was said that the prisoner had been made drunk in order to make him confess ; his having been drunk when he confessed was held not to render the confession inadmissible, though it would be a matter affecting the weight which ought to be given to it—*K.* § 170.

489. Although a confession, obtained by means of promises or threats, cannot be received, yet, if in consequence of that confession, certain facts, tending to establish the guilt of the prisoner, are made known, evidence of those facts may be received. So where the prisoner, under the improper influence of a promise, or threat proceeding from a person in authority, has confessed, and pointed out where he had concealed stolen property, so much of the confession as shows that the prisoner was acquainted with the place where the property was concealed is receivable to prove his knowledge of that fact ; though no other part of the confession may be received.—*Ib.* § 172.

490. A confession made under the influence of a threat or promise is excluded on the supposition that it may be false, but so much of it as relates to an ascertained fact is evidently true, and is therefore admitted. But it is absolutely necessary that there should be some corroborative fact to render any portion of such a confession admissible. So where a prisoner, after having confessed under the influence of a promise, pointed out a person to whom he alleged that he had given stolen property, and that person denied the fact, no part of the confession was admitted, and it was afterwards held that evidence of the prisoner having taken the officer to the house and pointed out the person was equally inadmissible.—*Ib.* § 173.

491. Except in cases of conspiracy, the confession of one prisoner is no evidence against another ; and the confession of a principal is no evidence against an accessory. But it seems that a principal felon may give evidence as a witness against an accessory where the accessory is indicted separately ; and that an accomplice is a competent witness for a prisoner with whom he has committed a crime, if he is not joined in the same indictment.—*Ib.* § 175.

492. The practice of the Foujdaree Adawlut, and of the Mofussil Courts, is to require corroboration of the confession by independent evidence.—*Ib.* § 180.

493. A person may confess a crime under a mistake as to fact, as where a father thought he had killed his child by beating her, not being aware that she had taken poison, which was the actual cause of death. Or he may be mistaken as to the law, as where a man pleads guilty to a charge of robbery, while, in reality, he is guilty only of theft, being ignorant that violence or intimidation is in law a necessary ingredient in the crime of robbery.—*Ib.* § 182. •

494. Not to mention the ordinary cases in which hope or fear may lead an innocent person to make a false confession of guilt, we will pass on to some of the less obvious motives which may lead to the same result. Some persons have falsely confessed a minor offence in the hope of preventing enquiry into a more serious crime, which they have actually committed. Others are said to have confessed capital crimes from mere weariness of life; females are said to have falsely confessed illicit intercourse in order to secure their private ends, such as divorce from their husbands, or freedom from molestation. Some have confessed for the love of being talked about; and soldiers on foreign service have falsely confessed to crimes committed in England, in order that they might be sent home to be tried.—*Ib.*

495. Confessions should, therefore, be received with much caution. Mr. Mayne, in his valuable work on Criminal Law, at page 204, quotes the opinion of Mr. Morehead "that the Subordinate Criminal Judge should invariably inform prisoners under trial that whatever they may state before him will be used as evidence against them;" and the practice, though perhaps generally superfluous, would probably be beneficial in dealing with very ignorant prisoners.—*Ib.* § 185.

496. By the Code of Criminal Procedure, Act XXV of 1861, Sections 148 and 149, no confession or admission of guilt made to, or whilst the prisoner is in the custody of, a Police officer, shall be used as evidence against a person accused of any offence, unless it be made in the immediate presence of a Magistrate.

497. In receiving hearsay evidence of oral confessions made out of Court, we must be on our guard against the misrepresentation of the reporting witness, which misrepresentation may be intentional or not. The witness must not only be honest but intelligent, and careful both in hearing and reporting the words used; and the evidence of an ordinary witness to an oral confession

is generally of little weight in India ; for if they exactly concur in their statement of the words used by the prisoner, it is almost certainly the result of tuition, and if their statements differ materially, the confession is not proved. The same remark will apply equally to the case of a reported admission in a civil suit.—*Ib.* § 186.

498. Evidence is sometimes offered to show that the prisoner was silent, or gave an evasive answer, when charged with the crime. The weight due to such a circumstance will depend very much on the manner in which the accusation was made ; whether it was understood to be made in sport or in earnest ; whether it was made soon after the discovery of the crime, by a person in authority ; in short, whether, under all the circumstances of the case, the accused would naturally think it necessary to repel the accusation. Even where the charge has been made formally by a person in authority, a cautious man, though innocent, may think it best to reserve his defence for the trial rather than say any thing hastily beforehand ; and further, many of the motives which have induced men to make false confessions might equally induce them to feign guilt by silence under accusation. Hence such evidence is seldom of much value.—*Ib.* § 187.

3. *Matters of Public and General Interest.*

499. It is necessary to bear in mind the distinction between the terms “public” and “general.” *Public* is used of that which is common to all : as a highway. *General* of that which concerns many indeed, but not the entire body of the public : as a right of common, in which only the inhabitants of one or more parishes participate. In respect to the former class, evidence of reputation from *any one* is receivable ; in respect to the latter, evidence of those actually unconnected with the particular locality would not be admissible.—*N.* § 131.

500. A boundary between villages ; the limits of a village or town ; a right to collect tolls ; a right to trade to the exclusion of others ; a right to pasturage of waste lands ; liability to repair roads, or plant trees ; rights to water-courses, tanks, ghauts for washing ; rights of common and the like, will be found the most ordinary in Mofussil practice.—*Ib.* § 133.

501. Old documents, leases, maps, and the like, and, in this country, copper grants or sasanums of pagodas, are as receivable as the oral declarations of deceased individuals ; verdicts and

judgments in suits wherein the same right was in dispute, though not between the same parties.—*Ib.* § 136.

502. But a judgment must have been delivered by a Court of competent jurisdiction, and secondly it must be final, and not a mere interlocutory judgment.—*Ib.* § 137.

503. The qualifications under which hearsay evidence is receivable in the matters under consideration, are—

1) That the declaration must have been made before the dispute itself was afoot, for this affords one of the best safeguards for its veracity. If such declarations,* made *after* the point was in dispute, were admitted, it is manifest that we should offer a premium to their fabrication.—*Ib.* § 140.

2) That the evidence must be confined to general facts : evidence of particular acts cannot be given. For instance, suppose the dispute were about a right of way from one village to another. A witness might say that he had heard old deceased persons say that the way had always been used as a public path : but he would not be allowed to say that A. B., deceased, had told him that he had individually used the way : for *non constat* but that he was a trespasser.—*Ib.* § 143.

4. Pedigree.

504. Matters of pedigree include questions of descent, relationship, and connexion by marriage. The difficulty of proving such facts by the direct evidence of persons who can speak from their own knowledge calls for the admission of hearsay ; and the facts are generally sufficiently public to be so established safely.—*K.* § 196.

505. Hearsay evidence of declarations of deceased persons may be received in such matters to prove that parents lived together as husband and wife, and acknowledged each other as such, and recognized their children as legitimate ; and not only may such oral hearsay be received, but documentary evidence which would otherwise be rejected as hearsay may also be admitted in matters of pedigree ; thus “ entries made by deceased members of a family in books such as Family Bibles, Almanacs, Prayer-Books, correspondence between relatives, recitals in deeds, descriptions in wills, genealogical trees hung up in family mansions, inscriptions on tombstones, rings, monuments, or coffin plates, charts of pedigrees made or adopted by deceased

members of the family, &c., have severally been held receivable in evidence for this purpose.—*Ib.* § 197.

506. It is essentially necessary, for the reception of hearsay in matters of pedigree, that the original author of the statement should have had the means of knowledge, *i. e.*, he must be a competent witness supposing he could have been produced (*N.* § 162,) and the declaration should have been before the question in issue was disputed. It is further requisite that the person who made the declaration should be since dead; and it was formerly held to be necessary that he should have been a member of the family; but by Section XLVII, Act II of 1855, "the declarations of illegitimate members of the family, and also of persons who, though not related by blood or marriage to the family, were intimately acquainted with its members and state, shall be admissible in evidence after the death of the declarant in the same manner and to the same extent as those of deceased members of the family."—*Ib.* § 198.

507. Hearsay evidence must be confined strictly to matters of lineal descent, relationship, or affinity, and it is not admissible to prove collateral matters such as the *place* of birth. If, however, such a point serve to identify the relations, as where a person is called after a particular place, it has been thought reasonable that the circumstance should be proved in the same manner as matters strictly of pedigree.—*Ib.* § 200.

5. *Ancient Possession.*

508. A document 30 years old, and purporting to have been executed at the time of the transaction to which it relates, is admitted, without calling the attesting witnesses, in proof of ancient possession; provided that it comes from proper custody; and provided that to prove ancient possession the document is supported by proof of some act implying ownership, such as repairs of a house, receipt of rent, &c., having been done by virtue of the document. It is a presumption of law, which cannot be rebutted by the opposing party, that after the lapse of 30 years all the attesting witnesses are dead. But if there be any erasure or interlineation, or any other ground to suspect the document, it is prudent to prove it by any of the attesting witnesses who may be still living, or by evidence of the handwriting. It is sufficient that the document be produced from a place where it was likely to have been found, and it is no ob-

jection that a *more* proper place may exist. Lastly, the document must have formed part of a transaction, and not be a mere narrative of past events.—*Ib.* § 202.

6. *Declarations or Entries made against Interest.*

509. If a party, who has peculiar knowledge of the fact by his written entry, or even declaration concerning it, discharges another upon whom he would otherwise have a claim, or charges himself, such entry is admissible evidence of the fact after the death of the party.—*K.* § 205.

510. So entries made by stewards, receivers, and other agents, charging themselves with the receipt of money, have been admitted after their death as good evidence of the facts entered.—*Ib.* § 206.

511. Section XXXIX, Act II of 1855, provides that entries or statements made against interest shall be admissible though the person who made them be not dead, "if he is incapable of giving evidence by reason of his subsequent loss of understanding, or is at the time of the trial, or hearing, *bonâ fide* and permanently beyond the reach of the process of the Court, or cannot, after diligent search, be found."—*Ib.* § 207.

512. The interest must have been pecuniary or proprietary, and not merely that arising from friendship, curiosity, or a love of information: and the person who made the entry or statement must have had the means of knowing the truth of the fact to which the entry or statement referred.—*Ib.* § 208.

513. Entries against interest need not have been made at the time of the event to which they refer, and they are receivable in evidence even when made in a private book. Further, they are admissible to prove, not only the simple fact of receipt or payment of money, but also such other circumstances as the time, place, and manner of payment or receipt.—*Ib.* § 209.

514. It seems that that side of an account only which contains the entry against interest, and not the opposite side, is receivable; but that the mere fact of the balance finally proving to be in favor of the person who made the entry would not render an entry against his interest inadmissible.—*Ib.* § 210.

515. It seems that oral declarations against interest are as admissible as written entries. But, in the case of written entries, the entries must be proved to have been written or signed by the

person who is said to have made them ; which may be done by proving the handwriting.—*Ib.* § 211.

516. Cases may occur in which an entry, apparently at first sight against interest, is not really so. So a person holding a stale bond, on which the period for the limitation of suits has expired, may seek to revive his claim by falsely charging himself by endorsement with the receipt of part payment. Such an endorsement would, under those circumstances, be only apparently against interest, but in point of fact the other way. Hence it has been thought necessary in such cases in the first instance to offer evidence that the endorsement was made before the expiration of the period of limitation.—*Ib.* § 212.

7. *Declarations or Entries made in the course of Business.*

517. Declarations or entries made in the ordinary course of business or duty, by persons who had knowledge of the facts, are admissible in evidence after the death of those persons, if they have been made at the time of the facts to which they relate.—*Ib.* § 213.

518. Entries in the ordinary course of business were formerly admissible in evidence only after the death of the person who had made them ; but they are now admissible, under Section XXXIX, Act II of 1855, in case of the person being insane, out of reach, or unfound ; and Section XL of the same Act provides that such an entry shall, if made at or about the time of the transaction to which it relates, be received in evidence for the limited purpose of identifying by name, description, number, or otherwise, any Bank Notes, or other securities for the payment of money, or other property, and the payer in, or receiver of them, though the person who made the entry, or he on whose information it was made, be alive, and capable of being produced as a witness.—*Ib.* § 215.

519. An entry in the usual course of business is admissible only if the person who made it, or signed it, had a personal knowledge of the fact to which it related. It is not sufficient if he derived his knowledge from the information of another person.—*Ib.* § 216.

520. It seems that some evidence ought to be given to show that the entry was made in the usual routine of business or duty ; for the admissibility of the entry mainly depends on its having been made in the usual course of business by a person whose duty or regular practice it was to make such an entry.—*Ib.* § 217.

521. The entry is admissible only so far as it was the duty of the person to make it, and, therefore, it is not admissible to prove any collateral facts such as it was not his duty to enter. So where an officer had made a return of the arrest of a person in the usual course of his duty, mentioning in his return the *place* where the person had been arrested, and it afterwards became material to enquire as to the place of arrest, the return was not admitted to show the place, because it was held to have been no part of the duty of the officer to mention the place in his return. And for the same reason, though it is well-known that the Jews always circumcise their children on the eighth day as enjoined by their law, yet an entry made by a priest of his having performed the rite on a certain day was not admitted to prove the age of the child.—*Ib.* 218.

522. Finally, the entry must have been made at or about the time of the facts referred to; for such an entry made after the lapse of some time would be totally untrustworthy. But it seems that an oral declaration made in the ordinary course of duty or business would be as admissible as a written entry.—*Ib.* § 219.

523. The practice in regard to entries made in the ordinary course of business is extended by Section L, Act II of 1855, to the proof of the despatch of a letter by the production of a book into which letters are in the course of business copied, and afterwards despatched, supported by the testimony of a witness stating his belief, founded on reasonable grounds, that the letter was according to the usual practice, and to the best of his knowledge despatched. On such evidence the Court may presume that the letter was despatched, and it would seem to be no objection that the witness had no personal knowledge of the fact of the despatch of that particular letter.—*Ib.* § 220.

524. So also Section LI provides that “any book proved to have been kept for making the despatch and receipt of letters containing an entry of the despatch of a letter, and an acknowledgment of the receipt of such letter, shall, on proof that such entry was made in the usual course of business, be *primâ facie* evidence of the receipt of such letter.”—*Ib.* § 221.

525. Entries in the usual course of business, under the conditions which we have now considered, form independent proof of the facts to which they relate. But it seems that under Section XLIII, Act II of 1855, any “books proved to have been re-

gularly kept in the course of business, or in any public office, shall be admissible as *corroborative*, but not as independent proof of the facts stated therein," for which purpose it does not appear requisite that the person who made the entry should be dead, nor that he should have been personally acquainted with the fact referred to, nor indeed that he should not be a party to the proceedings. Sec. XLIV further provides that "the following documents may be admitted as corroborative evidence: Certificates of shares and of registration thereof, bills of lading, invoices, account sales, receipts usually given on the payment, deposit, or delivery of money, goods, securities, or other things, provided they be proved to have been given in the ordinary course of business."—*Ib.* § 222.

8. *Dying Declaration.*

526. Where a man is *in extremis*, i. e., dying, the awful position in which he is placed is held by the law to be a sufficient guarantee for his veracity; and, therefore, the tests of oath and cross-examination are dispensed with under such circumstances. The maxim of the law is "A man will not meet his Maker with a lie in his mouth."—*N.* § 165.

527. Hearsay is admitted in evidence chiefly on account of the general difficulty of procuring good evidence of the commission of murder or homicide, which crimes are generally perpetrated in secret.—*K.* § 226.

528. It is necessary that the person who made the dying declaration should have been of such a mature and sound understanding that if he had lived he might have been judicially examined upon oath; and accordingly the declaration of very young children, and of others who are not of such sound understanding as to have any idea of a future state, or any notion of the obligation of an oath, are not receivable.—*Ib.* § 227.

529. It is essentially necessary that the person who made the dying declaration should have thought himself to be in danger of approaching death, though he entertained, at the time of making it, hope of recovery.—*Ib.* § 228.

530. But it is not necessary that the declarant should have expressed in words his sense of his approaching death. His sense of danger may be inferred from his conduct, and from all the circumstances of the case.—*Ib.* § 229.

531. The statement of the deceased must be such as would be admissible if he were alive and examined as a witness; conse-

quently, a declaration on matters of opinion as distinguished from facts will not be receivable.—*Ib.* § 232.

532. The following remarks are here necessary. 1. Dying declarations are only receivable in criminal cases. 2. The charge must be one of homicide. The only points they are receivable to prove are the cause and circumstances of death. Thus the circumstances of robbery attended by death could not be thus proved. 4. It matters not in what form the dying declaration is taken. 5. The interval between the time of the declaration and death is immaterial. 6. The statement of a dying man in favor of a prisoner is as receivable as one against him. 7. Dying declarations are as open to be contradicted by proof as any other evidence.—*N.* § 169.

533. In weighing the credit due to a dying declaration, it will be as well to consider the following points: 1. Whether the declaration has probably been correctly reported by the witnesses. 2. Whether the deceased had probably a clear idea of that which had taken place, or whether, in the confusion and excitement of the affray, he may have been mistaken. 3. Whether he harboured any animosity or ill-will towards the accused. And 4, whether the accused had any opportunity of cross-examining the declarant.—*K.* § 235.

Indirect or Circumstantial Evidence.

534. If a point in issue is proved by the testimony of eye-witnesses, such evidence is called Direct, Immediate, or Positive. But, where the point in issue cannot be proved by eye-witnesses, it may perhaps be inferred with more or less probability from certain circumstances which usually precede, accompany, or follow such a fact. So if I see the ground wet, I may infer or presume that it has rained: if I see foot-marks on it, I may infer or presume that some person has passed that way; and if I see a man hiding himself, I may infer (though with less certainty) that he has done wrong. Now evidence of such circumstances, from which a fact in issue is to be inferred, or presumed, is called circumstantial, indirect, or presumptive. (*K* § 87.) The necessity for resorting to circumstantial evidence is two-fold. *First.* In the absence of direct evidence. *Second.* To check direct evidence.—*N.* § 294.

535. The law does not consider circumstantial evidence to be inferior in quality to direct evidence. (*K.* § 88.) Thus a plaintiff

may cause witnesses to prove payment of rent to take his case out of the Regulation of limitation, and the witnesses may swear positively that they saw the defendant upon a given day, pay the plaintiff rent in money or kind. How simple a matter it is for a witness to swear falsely, "I saw such an act. I heard such a statement:" whereas a connected and consistent chain of circumstantial evidence can with difficulty be forged; and the concurrence of many minute facts is often of far more cogency than the oral testimony of a host of personal witnesses. There may be circumstantial evidence of defendant dealing with the property as his own in the presence of the plaintiff; deeds executed respecting it by the defendant to which the plaintiff has actually affixed his signature as a witness and the like.—*Ib.* § 295.

536. It is said that "in England the presumption is that a witness is the witness of truth, because the people there are much regarded for truth, and falsehood is considered highly disgraceful, and direct evidence of eye-witnesses is generally thought safer than circumstantial; but that in this country the presumption is that a witness is the witness of falsehood; and the relative value of direct evidence is very much lower because perjury and falsehood are lightly regarded." (K. § 89 and N. § 776.) Of course, if direct evidence is *credible* it is superior to any other class and more satisfactory to the Judge's mind.—*Ib.*

537. It is a general rule that circumstantial evidence shall never be resorted to, when direct evidence of the same fact is procurable and kept back. Thus, in a case of murder there will be an eye-witness of murder whose evidence was forthcoming, it would not be open to the prosecution to keep back that witness, and endeavour to establish the guilt of the accused by a chain of circumstantial evidence.—*Ib.* 298.

538. A second rule is, that the proof of the circumstances themselves must be direct. That is, the circumstances cannot be proved by hearsay. Thus, if the circumstance offered in evidence is the correspondence of the prisoner's shoes with certain marks in mud or snow, the party who has made the comparison and measurement must himself be called; not a third party, who *heard* from the measurer, of the correspondence. A third rule is that circumstantial evidence to amount to proof must exclude every hypothesis except that of the guilt or liability of the accused. If its effect is consistent with any other hypothesis, a doubt is introduced, and the accused should have the benefit of it.—*Ib.* 299.

Competency of Witness.

539. By Section XIV, Act II of 1855, children under 7 years, and persons of unsound mind, are only declared incompetent to testify. (*K. § 250.*) Interest or relationship is no ground of incompetency. A party to a suit may be compellable to give evidence either on his own behalf or on behalf of the other party. A prosecutor is competent witness, even though he is entitled to reward.—*K. § 252.*

540. A husband and wife are also competent to give evidence against each other (except privileged communication.) A wife may be witness against her husband where she has been ineffectually poisoned by him, or has suffered violence at his hands, or has been forcibly married to him.—*Ib. 253.*

541. Conviction of any offence is no ground of incompetency. (*Act XIX of 1837.*) But convicted accomplices (not approvers) cannot be witnesses against any of the co-defendants, (*N. § 783*); and the same principle was adhered to by Mr. Chatfield in case No. 47 on the calendar for 1861, wherein he pointed out to the Principal Sudder Amcen the illegality of admission of such convicted accomplices.

*Mode of procuring the attendance of Witnesses.**

542. The Procedure Act VIII of 1859, Sections 154 to 171, and Act X of 1855, Sections II to VI and VIII, lay down the law regarding the attendance of witnesses, and Sections 175 to 178 of Act VIII provide for the examination of persons resident at some place distant more than a hundred miles from the Court; and also of the persons exempted by reasons of rank or sex from personal appearance in Court.

543. The attendance of witnesses residing in foreign European or native States is procured by a summons addressed to the Resident, (*N. § 330*); and as for those residing in French territory, to Monsieur le Judge de Paix, Lieu de Police à Pondichery.—*C. O. S. U., 11th May 1831.*

544. Commissions to examine witnesses in Ceylon must be sent to that Government addressed to the Secretary to Government.—*N. § 331.*

545. The circular order of Sudder Udalut of 12th July 1830 (A) relates to the examination of native women of the Nair caste.

* See Appendix I, title "Process."

546. In a criminal case, an oil woman claimed the privilege of this circular order, but Mr. Chatfield refused to extend it to her, because it was intended to apply only to *Nair* women.

547. Disgrace arising from attending a Court as a witness is no ground of exemption, (*N.* § 333); and the same principle was adopted by our Court and also by the Sudder Court, regarding the attendance of Moodbidry Chowter.

548. The Government have declared that "the authority to summon parties to a suit under Act X of 1855 may not be abused in the case especially of natives of distinguished rank. There is no appeal from an order passed by the presiding Judge on such a point; but those misusing the power would be liable to severe reprimand and even grave punishment."—*C. Letter S. U.*, 25th October 1857.

549. When the evidence of a Collector or any of his European subordinates may be required by a party, Courts are to satisfy themselves that the fact to be established by such officer's testimony is *material*, and that sufficient evidence thereon is not obtainable without his appearance.—*C. O. S. U.*, 22nd January 1858.

550. Civil and Criminal Courts may directly summon public servants without applying to their superiors.—*C. O. S. U.*, 10th November 1859.

551. Witnesses are protected from arrest on *their way to the Court, at Court, and on their way back*.—*N.* § 360.

552. The above protection extends only to civil suits. A witness may be arrested at any time on a charge of crime. Home itself affords no protection in such a case.—*Ib.* 362.

553. Bail may arrest the party for whom he is security at any time; for this is said not to be a taking, but re-taking.—*Ib.* 363.

554. As regards punishment of witnesses or other persons who may be guilty of contempt of Court, and of offences against public justice, the readers are referred to Chapters X and XI of the "*Indian Penal Code*;" of which the following is an abstract table :

TABLE OF CONTEMPTS OF THE LAWFUL AUTHORITIES OF PUBLIC SERVANTS, AND OF OFFENCES AGAINST PUBLIC JUSTICE, AND PUNISHMENT FOR THE SAME.

| Section of the Penal Code. | Offence. | Punishment. | By what Court tribunal. |
|----------------------------|---|---|---|
| 172. | Absconding to avoid service of summons or other proceeding from a public servant. If summons or notice require attendance in person, &c., in a Court of Justice. | Simple imprisonment for 1 month, or fine of 500 Rupees, or both. Simple imprisonment for 6 months, or fine of 1,000 Rupees, or both. | Magistrate of the District, or Subordinate Magistrate of the 1st Class. Ditto |
| 173. | Preventing the service or the affixing of any summons or notice, or the removal of it when it has been affixed, or preventing a proclamation. If summons, &c., require attendance in person, &c., in a Court of Justice. | Simple imprisonment for 1 month, or fine of 500 Rupees, or both. Simple imprisonment for 6 months, or fine of 1,000 Rupees, or both. | Ditto Ditto |
| 175. | Intentionally omitting to produce a document to a public servant by a person legally bound to produce or deliver such document. | Simple imprisonment for 1 month, or fine of 500 Rupees, or both. | Court in which the offence is committed, subject to the provisions of Chapter X of the Criminal Procedure Code; or if not committed in a Court, the Magistrate of the District, or Sub-Magistrate of the 1st Class. |
| 178. | Refusing oath when duly required to take oath by a public servant. | Simple imprisonment for 6 months, or fine of 1,000 Rupees, or both. | Ditto |
| 179. | Being legally bound to state the truth, and refusing to answer questions. | Ditto | Ditto |
| 180. | Refusing to sign a statement made to a public servant when legally required to do so. | Simple imprisonment for 3 months, or fine of 500 Rupees, or both. | Ditto |

| Section of the Penal Code. | Offence. | Punishment. | By what Court tribunal. |
|----------------------------|---|---|---|
| 193. | Giving or fabricating false evidence in a judicial proceeding. | Imprisonment of either description for 7 years, and fine. | Court of Session. |
| 194. | Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence. | Transportation for life, or rigorous imprisonment for 10 years, and fine. | Ditto. |
| 195. | Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation, or imprisonment for more than 7 years. | Ditto | Ditto |
| 196. | Using in a judicial proceeding evidence known to be false or fabricated. | Ditto | Ditto |
| 199. | False statement made in any declaration which is by law received as evidence. | The same as for giving false evidence. | Ditto |
| 200. | Using as true any such declaration known to be false. | Ditto | Ditto |
| 205. | False personation for the purpose of any act or proceeding in a suit or criminal prosecution, or for becoming bail or security. | Imprisonment of either description for 3 years, or fine, or both. | Ditto |
| 206. | Fraudulent removal or concealment, &c., of property to prevent its seizure as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree. | Imprisonment of either description for 2 years, or fine, or both. | Magistrate of the District, or Subordinate Magistrate of the 1st Class. |

| Section of the Penal Code. | Offence. | Punishment. | By what Court tribunal. |
|----------------------------|--|---|--|
| 207. | Claiming property without right, or practising deception touching any right to it, to prevent its being taken as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree. | Imprisonment of either description for 2 years, or fine, or both. | Magistrate of the District, or Subordinate Magistrate of the 1st Class. |
| 208. | Fraudulently suffering a decree to pass for a sum not due, or suffering decree to be executed after it has been satisfied. | Imprisonment of either description for 2 years, or fine, or both. | Magistrate of the District. |
| 209. | False claim in a Court of Justice. | Imprisonment of either description for 2 years, and fine. | Ditto |
| 210. | Fraudulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied. | Imprisonment of either description for 2 years, or fine, or both. | Ditto |
| 228. | Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding. | Simple imprisonment for 6 months, or fine of 1,000 Rupees, or both. | Court in which the offence is committed; subject to the provisions contained in Chapter X of the Code of Criminal Procedure. |

555. Sec. XVI, Act XXIII of 1861, enacts, "When in any case pending before any Court, any witness or other person shall appear to the Court to have been guilty of an offence described in Sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, or 210 of the Indian Penal Code, the Court may commit such person to take his trial for the offence before the Court of Session, or, after making such preliminary enquiry as may be necessary, may send the case for investigation to any Magistrate having jurisdiction to try or commit for trial the accused person

for the offence charged, such Magistrate shall thereupon proceed according to law."

556. Sec. XIX of the same Act provides, "When in any case pending before any Court there shall appear to the Court sufficient ground for sending for investigation to the Magistrate a charge described in Sections 463, 471, 475 or 476 of the Indian Penal Code, which may be preferred in respect to any deed or paper offered in evidence in the case, the Court may send the person accused in custody to the Magistrate, or take sufficient bail for his appearance before the Magistrate. The Court shall send to the Magistrate the evidence and document relevant to the charge, and shall bind over any person to appear and give evidence before such Magistrate. The Magistrate shall receive such charge and proceed with it under the rules for the time being in force."

557.* And Section XXI provides, "When any such offence as is described in Sections 175, 178, 179, 180 or 228 of the Indian Penal Code is committed in the view or presence of any Court, it shall be competent to such Court to cause the offender, whether he be a European British subject or not, to be detained in custody; and at any time before the rising of the Court on the same day to take cognizance of the offence, and to adjudge the offender to punishment by fine not exceeding 200 Rupees, or by imprisonment in the Civil Jail for a period not exceeding one month, unless such fine be sooner paid. In every such case, the Court shall record the facts constituting the contempt, with any statement the offender may make, as well as the finding and sentence. If the Court, in any case, shall consider that a person accused of any offence above referred to should be imprisoned, or that a fine exceeding 200 Rupees should be imposed upon him, such Court, after recording the facts constituting the contempt, and the statement of the accused person as before provided, shall forward the case to the Magistrate, or, if the accused person be a European British subject, to a Justice of the Peace, and shall cause bail to be taken for the appearance of such accused person before such Magistrate or Justice of the Peace, or if sufficient bail be not tendered, shall cause the accused person to be forwarded under custody to such Magistrate or Justice of the Peace.

* See also Criminal Procedure Code, Section 163.

Written Instruments.

558. Written instruments are divided into—I. Public, and II. Private. Public instruments again are divided into—1st, Not-Judicial; 2nd, Judicial.—*N.* § 440—1.

559. The first class consists of Acts of Parliament, Acts of the Legislature, Regulations, Proclamations, Government Gazettes, Advertisements, public books, maps, foreign laws, &c.—*Ib.* § 442, 445, 447 to 449.

560. With regard to old maps, and all ancient instruments of a public as well as of private character, it is, however, essential, before such documents can be admitted in proof, that they should be shown to have come out of the proper custody. By proper custody is not meant exclusively the most proper custody, but such custody as the document might reasonably be expected to come from, so as to prevent any suspicion of its having been tampered with or fabricated.—*Ib.* § 453.

561. Judicial documents are divided into—1st, judgments; which includes all interlocutory as well as final judgments, judicial orders, &c.; 2nd, depositions, examinations, &c., taken during the course of the proceedings or trial of a cause, &c.; 3rd, writs, summonses, process incidental to the trial of a cause, &c.—*Ib.* § 457.

Judgments.

562. We may consider these—1st, as to their mode of proof; 2nd, as to their effect; 3rd, as to the mode in which they may be rebutted.—*Ib.* § 458.

563. *As to their mode of proof.*—A judgment is proved by the production of a certified copy on stamp paper. But no stamp is necessary for a judgment where the amount in issue is under 50 Rupees according to the new Stamp Act, or for a judgment of the Supreme Court.—*Ib.* § 459.

564. *Effect of Judgments.*—The production of a judgment is proof of its existence and of its legal consequences against all the world. Thus, in an action by a surety against his principal, to recover money which the surety has been compelled to pay on his guarantee, if the surety puts in evidence the judgment of the Court in the suit in which he was compelled to pay, that is proof of the amount of damages which he has sustained.—*Ib.* § 465.

565. Judgments are of two kinds; 1st, *In rem*; 2nd, *Inter parties*. (*Ib.* 469.) A judgment *in rem* has been defined “an adjudication pronounced upon a status or condition of some particular sub-

* An order given by a Collector not under Regulation V of 1822, or under XI of 1816, as a Magistrate, is no evidence.—*S. D.*, p. 26 of 1862.

ject-matter by a Court having competent authority for that purpose." (*Ib.* 470.) The condemnation of a ship as a prize, of contraband goods by competent Revenue Authorities, sentence of divorce, probate of a will, and judgments of adoption, bastardy, adultery, (*N.* § 84), and, I conceive, *expiation* (*Mis. Petition, Nos. 356 and 767 of 1859*), are instances of judgments *in rem*. Such judgments are held to be conclusive against all the world, partly because, in most of such cases, any person whose interests are likely to be affected may become a party to the suit; and partly because by the judgment itself the condition of the subject-matter is fixed once for all, and cannot afterwards be altered; also for the sake of checking litigation.—*K.* § 362.*

566. It must, however, appear on the face of the proceedings *in rem*, that the fact was put directly in issue and was actually decided by the Court. Otherwise the judgment will not be conclusive, and the fact may be disproved in a subsequent suit.—*Ib.* § 363.

567. Judgments upon the subject of a public nature, such as customs, prescription, tolls, boundaries between parishes, counties or manors, rights of ferry, liabilities to repair roads or sea walls, and the like, will not only be conclusive against parties, but will be admissible though not conclusive against strangers as evidence of reputation.—*Ib.* § 364.

568. Judgments *inter parties*.—These are not receivable in evidence against any who are strangers to them. For the party against whom such a judgment is offered could justly say, "I ought not to be bound by this decision, because I had no opportunity of stating my defence, of cross-examination, or of appeal." If, on the other hand, it were offered by a party who was a stranger to it, the party whom he sought to bind by it could fairly say, "This is inequitable: there is no *mutuality* in this proceeding, for my antagonist seeks to bind me by a judgment which, were I to seek to offer it against him, could clearly not affect him, for he

* It has lately been ruled by the Hon'ble Mr. Justice Holloway, (*II. H. C. R.*, 276) that "the rule which makes a judgment conclusive against parties, and those who claim under them, is subject to certain exceptions which are the offspring of the positive law, and the reasons for the exception may be generally stated to be that the nature of the proceedings by which there is fictitious, though not unjust extensions of parties, renders it proper to use the judgment against those not formally parties. The rule as to judgment *in rem* in some peculiar cases results from the nature of the proceedings, and, before attempting to apply the rule in this country, consideration should be given to the question whether there are Courts so proceeding as to warrant the application of the doctrine of decrees *in rem*."

himself was no party to it ;" and so far as he is concerned, he could in such a case object that it was merely *res inter alios judicata*.—*N.* § 476—7.

569. This want of mutuality, as it is called, is of grave importance, and should always be present to the Pleader's mind in considering whether he has a valid objection to a judgment offered against his client.—*Ib.* § 478.

570. Judgments *inter parties* are generally understood as applying to actions on private contracts, or private torts or wrongs ; and here the rule certainly prevails that they are conclusive only against the parties to them, not even admissible against strangers to them.—*Ib.* § 480.

571. By parties is understood all those who are named on the record ; and their privies, those who claim through, or under, the original parties.—*Ib.* § 481.

572. Another good test for determining whether a judgment in a former suit is a bar in the second, is to consider whether the same evidence would sustain both.—*Ib.* § 482.

573. The fact which the judgment is adduced to prove must have been *in issue* in the former as well as in the latter action. It need not have been the *sole* fact in issue : nor does it matter whether the parties filled the same relative positions of plaintiff and defendant in both actions.—*Ib.* § 483.

574. The fact must also be one which must necessarily have been enquired into, *i. e.*, without an investigation as to which the judgment could not have been pronounced.—*Ib.* § 484. (*Vide II. H. C. R.*, 131.)

575. The judgment must have been pronounced decidedly upon the point as to which it is offered as a proof in the second action. It is not sufficient to gather inferentially, from a perusal of the judgment, that the point must have been investigated or decided upon ; but the judgment must itself absolutely show this.—*Ib.* § 485.

576. The judgment must have been given upon the merits. The case must not have gone off upon some technical or preliminary point ; such, for instance, as a discontinuance of the action, non-suit, or the like.—*Ib.* § 486.

577. A judgment, when it is intended to be used as a bar conclusive against the opponent, ought to be pleaded, in which case *issue* must be taken upon it ; and if it be found in favor of the

party producing it, subject to the above specified condition, the litigation is terminated ; but if the party relying on the judgment has neglected to plead it, he may still produce it at the trial as part of his evidence : and in that case, the Judge will attach to it whatever weight he thinks it entitled to.—*Ib.* § 487.

578. A judgment in a criminal matter is not admissible in evidence in a civil action and *vice versâ*.—*Ib.* § 488.

579. A judgment is not binding if the Court be interested in the subject in dispute ; for “ no man can be judge in his own cause.”—*Ib.* § 490.

580. *Foreign Judgments*.—These are conclusive under the same circumstances as those of a domestic tribunal. But if, on the face of the judgment, there is a patent error, the judgment is impeachable on that ground. Irregularity will not be presumed ; it is incumbent on the party impeaching the judgment to prove the irregularity.—*Ib.* § 491 to 493.

How a Judgment may be impeached or rebutted.

581. Any judgment may be impeached on the ground of fraud or collusion. But it is not a fraudulent defence which will suffice ; it must be a fraud in the procuring of the judgment, such as collusion or the like (between the parties), or fraud in the Court itself.—*Ib.* § 495.

582. It may be shown that the alleged judgment never had any existence, or was void *ab initio*. For instance, that it is a forgery ; or that the Court pronouncing it had no jurisdiction. The effect of a judgment may be rebutted by showing that the judgment has been reversed.—*Ib.* 496 to 498.

Deposition and Examination, &c.

583. The term *examination* is technically used of the party : the term *deposition* of a witness. Depositions are not evidence where the witness is alive and can be produced at the trial.—*Ib.* § 499 to 501.

584. If, however, a deponent be dead, or so infirm as to be unable to attend, or without collusion at such distance from the Court as would render his attendance inexpedient, deposition taken by a commission may be read. A deposition in a former suit can only be used if the subsequent suit is between the same parties. If the deposition be an oral one, it may be proved by the production of the Judge's notes or by the oath of some one who was present and heard it delivered. Extra-judicial depositions are not receivable, as where a person has made a voluntary affidavit. Before a deposition

is admitted in evidence, the existence of the former proceeding must be established. (*N.* § 502 to 506.) A deposition might be used to contradict and corroborate a witness. The death, absence, or sickness of a witness must be satisfactorily proved at the trial before his deposition can be used. In cases of search, the search must have been diligent and recent.—*Ib.* § 518 to 520.

585. Pleadings, if required to be proved, should be produced in the form of a certified copy : and some evidence should be offered of the identity of the party.—*Ib.* § 535.

Private Instruments.

586. All private writings tendered in evidence must be one of two classes : either made by a third person, or by the party against whom they are offered, or his privies. We shall consider private writings—1st, As to their nature and effect ; 2nd, As to the mode of their proof.—*Ib.* § 540—1.

Effect of Private Writings.

587. Written declarations and entries by third persons are generally not receivable, because they are *res inter alios acto*, not under sanction of an oath, nor tested by cross-examination. The exceptions to this are entries against interest in the course of business, &c.—*Ib.* § 542.

588. Private writing made by the party himself or his privy are ordinarily contracts or writings in connection with them. Contracts are reduced to writing for the express purpose of being afterwards referable to as the record of the agreement entered into. Some contracts are under seal ; others are not. The former are held to be of a more solemn character, on the supposition that they are generally entered into with a greater degree of deliberation than the latter, and they certainly by law require a more solemn revocation.—*Ib.* § 543.

589. The Hindoo law very clearly lays down the expediency of committing contracts to writing. According to Menu, "Men, after the space of six months, forget; therefore, the Creator invented writing." So a Hindoo written will excludes an oral disposition of property where the two are conflicting ; and it is expedient that when men have reduced their final settled wishes to writing, the writing itself should be taken to be the depository of their intentions.—*Ib.* § 544.

590. Where the writing of a party is used against him, its effect is that of an admission.—*Ib.* § 545.

591. Where a party has made an admission under seal, it must be pleaded if it is sought to *conclude* him by it: that is, if the antagonist has the *opportunity* of pleading it.—*Ib.* § 546.

Proof of Private Writings.

592. Whenever an instrument can be produced by a party, it should be so. (*Ib.* 548.) By Section 39, Act VIII of 1859, the plaintiff in a suit is required to produce, at the same time as the plaint, any written document on which he relies, together with a copy thereof (or, in case of a book, a copy of the entry on which he relies), which copy will be filed while the original will generally be returned, unless the plaintiff prefer to file it. Any document not produced in Court by the plaintiff, when the plaint is presented, shall not be received in evidence on his behalf at the hearing of the suit without the sanction of the Court.—*K.* § 384.

593. Under Section 40, if the plaintiff require the production of any written document in the possession or power of the defendant, he may, at the time of presenting the plaint, deliver to the Court a description of the document; and in summoning the defendant under Section 43, the Court will require him to produce that document, together with such as he may rely upon his defence.—*Ib.* § 385.

594. Under Section 107, any party to a suit desiring the production, by any other party to the suit, of any document, writing, or other thing in his possession or power, is to deliver to the Court two notices calling on the party to produce the same; one of such notices to be filed in Court, while the other is served on the party or his Pleader by the proper officer.—*Ib.* § 386.

595. By Section 128, the parties or their Pleaders are required to “bring with them, and have in readiness at the first hearing of the suit, to be produced when called upon by the Court, all

* By Act XVI of 1864, Section 13, certain instruments (which purport or operate to create, declare, transfer, or extinguish any right, title, or interest of the value of one hundred Rupees or upwards, in any immoveable property) were declared not to be received in evidence unless registered according to the provisions of the Act.

Under the above Act, there are two ways of registration—first, by acceptance by Registrar, and registration upon such acceptance; secondly, by registration under an order of Court obtained in a suit instituted under Sec. XV. of the Act. To the second mode, Secs. 36 and 37 do not apply. No time fixed for registration.—See *Madras Times*, 11th May 1866.

their documentary evidence of every description which may not already have been filed in Court, and all documents, writings, or other things which may have been specified in any notice which may have been served on them respectively within a reasonable time before the hearing of the suit; and no documentary evidence of any kind, which the parties or any of them may desire to produce, shall be received by the Court at any subsequent stage of the proceedings, unless good cause be shown to its satisfaction for the non-production thereof at the first hearing.—*Ib.* § 387.

596. The writing must be proved to be that of the party purporting to have written it. Where there is a signature, the signature should be proved. Where there is a seal, the execution of the instrument must be proved. The execution means, not the signature alone, but the *delivery of the instrument with intent that it should take effect absolutely*.—*N.* § 549.*

597. Where the instrument is attested, that is, has the signature of a witness, as well as of the party, generally speaking, the attesting witness should be called and prove his own and the parties' signature, and that he saw the party sign the same. When there are several attesting witnesses, it is not *necessary* to call them all, but one at least ought to be called.—*Ib.* § 450—1.

598. If the document is suspected or impugned, as where it is alleged to be a forgery, in prudence *all* the attesting witnesses should be called. Their absence affords strong ground for hostile comment by the opposite Pleader, and suspicion by the Judge.—*Ib.* § 552.

599. By Act II of 1855, Section XXXVII, it is provided that an attested document may be proved as if unattested unless it be a document to the validity of which attestation is requisite. Such, for instance, is the will of a British subject, which requires the attestation of two witnesses.—*Ib.* § 553.

600. Section XXXVIII of the same Act provides that the admission of a party of his own execution shall, as against himself, obviate the necessity of calling an attesting witness. And this admission may be either by the pleadings, or by the party in the witness box, or by his Pleader in the Court on his behalf during the trial.—*Ib.* § 555.

* Proof of handwriting of the deceased attesting witnesses to a document is held sufficient to make the document admissible in evidence without proof of execution or of the handwriting of the party executing, it.—H. Court Decree, O. S. N. 231 of 1865, reported in *Madras Times*, 11th May 1866

601. Where there is no attesting witness, or he is not called, the writing of the party, if not admitted by himself, must be proved *aliunde* by independent testimony. First, it may be that of one who was present, and who, though not attesting, saw him affix his signature or write the body, if not signed; secondly, it may be by a person who, although he did not see the identical writing, yet has a knowledge of the parties' handwriting or signature, from having seen him actually write, with more or less frequency; or though he has never actually seen him write, has corresponded with the party, and acted upon letters received from him. It will be apparent that there is between the first and last of these descriptions of testimony to the fact of handwriting a wide margin for accuracy or inaccuracy of knowledge or belief; which must vary with the particular circumstances of each case; to elicit this should be the object of cross-examination; and the degree of dependence to be placed upon the witness will, of course, also vary in proportion.—*Ib.* § 556.

602. A witness might speak to the probable period about which an ancient writing was written, and an *expert* has been permitted to state his belief that a document was in a feigned hand; but in neither of these cases was the belief or opinion the product of direct comparison, but in the one of antiquarian knowledge; in the other of general experience of the character of genuine handwriting: which possesses a freedom and boldness distinguishable from feigned character by scientific eyes.—*Ib.* § 558.

603. On an enquiry whether a signature, writing, or seal is genuine, any undisputed signature, writing, or seal of the party, whose signature, writing, or seal is under dispute, may be compared with the disputed one; though such signature, writing, or seal be on an instrument which is not evidence in the cause.—*Ib.* § 562.

604. Persons who cannot read and write may be attesting witnesses to a legal instrument. Where an attesting witness denies his signature, or refuses to testify, his attestation may be proved by independent testimony. A document thirty years old, coming from the proper custody, does not require the evidence of an attesting witness to prove it, (though he may be present) independently of Section 37 of Act II of 1855.—*Ib.* § 563 to 5.

605. If an attesting witness has become blind or insane, or is dead or has been kept out of the way, proof of any of these facts

would afford good ground for the Court to admit the document by proof *aliunde*. In any such case, evidence may be given of the signature of the attesting witness, which is sufficient without proving the execution of the document by the party, as the witness is presumed not to have signed his attestation without all having been correctly done: or proof may be offered of the signature of the party under Act II of 1855, Section XXXVII.—*Ib.* § 566.

606. Sickness is rather a ground for postponing a trial, unless the sickness is of a permanent character. A blind witness should be called, because, though he cannot recognize his signature, he may recollect circumstances connected with the execution.—*Ib.* § 567.

607. When a document is in the hands of the opposite party, timely notice must be given to him to produce it: but where, from the nature of the proceeding, the party in possession of the document necessarily has notice that he is charged with the possession, notice is dispensed with.—*Ib.* § 568.

608. On proof that a party has received notice, if he refuse to produce the document, the party calling for it is entitled to give secondary evidence of its contents. Where a document is produced, it is still incumbent on the party calling for it to prove it, unless the party producing it admits the execution. If an assignee of the document produce it, it must still be proved.—*Ib.* § 570—1.

609. But if the party producing the document claim an interest under it, this is tantamount to an admission by him of the genuineness of the document, and supercedes the necessity of further proof. When the document is not produced, pursuant to notice, a copy or counterpart may be given; or if no copy, verbal evidence of the contents may be given: that is to say, secondary evidence of the original.—*Ib.* § 572—3.

610. At the same time, if a copy exists, and is producible, its non-production, and the substitution of oral evidence of the contents of the original, would be open to strong remarks.—*Ib.*

611. When an original document is beyond the reach of the Court, Act II of 1855, Section XXXVI, provides that the Court may make an order for the reception of secondary evidence; but proof must be given that the document is beyond the jurisdiction. When a document is destroyed or lost, secondary evidence of it is admissible upon proof of its destruction or loss. But there must have been a *bond fide* and diligent search for the missing document. What is such search, must depend

upon the particular circumstances of each case. A copy of a copy is never to be received. When the party called on to produce a document refuses to comply, and his adversary has then gone into secondary evidence of its contents, he cannot afterwards produce the original for the purpose of rebutting such testimony. He shall not be permitted to stand by and take his chance of what his adversary may be able to prove against him.—*Ib.* § 578 to 82.

612. A party who has given notice to produce, is not bound to pursue the matter further; and the opposite party cannot insist upon the document being produced, simply because he has had such notice; nor will it thereby become evidence for himself: but if the party who has given the notice call for the document, which is produced in consequence, and inspect it, and thereupon declines to put it in evidence, he thereby makes it evidence.—*Ib.* § 583.

Parol Evidence.

613. Parol evidence is offered with relation to written instruments in one or other of these three aspects. 1st. In opposition to written evidence; 2nd. In aid of written evidence; and 3rd, as independent evidence of a fact of which there may exist written evidence. When parol evidence is offered in opposition to written evidence, its object is, 1st, to supercede; 2nd, to contradict or to vary; or 3rd, to subvert, to add to, or to substract from written evidence.—*Ib.* § 627.

614. But such evidence is never admissible—

1st.—Where it seeks to supercede, viz., where the policy of the law has required the evidence of a particular fact to be in writing, as, for instance, Wills, Acceptance of Inland Bill of Exchange, ratification of promises made during infancy; or where the parties have eventually agreed that there shall be a written record of their intentions.—*Ib.* § 628—9.

2nd.—Where it seeks to contradict, vary, &c., viz., where, upon the face of a document, a party appears to be bound as principal, he cannot shew orally that it was agreed he should be merely a surety. So where a man signs as principal, he cannot, in an action against him by a third party, shew that he signed only as agent.—*Ib.*

615. It often happens, however, that the document is so worded that its meaning is *ambiguous*, or that though there may be no ambiguity on the face of the document, yet that extrinsic circumstances render the application of the document to one of two given states of facts a matter of doubt and ambiguity. There are two kinds of ambiguity which have been already noticed.

616. It is a good test of the character of an alleged ambiguity, to put the document into the hands of a person unacquainted with the facts; if such a one, on perusal, points out the ambiguity, it is *Patent*. If he discovers not the ambiguity, but circumstances of which he has no knowledge render the applicability of the document uncertain, the ambiguity is *Latent*. Parol evidence is never admitted to explain a patent ambiguity, but may be received for *Latent*.—*Ib.* § 632.

617. A document is not patently ambiguous because it is unintelligible to an uninstructed person; nor can foreign languages, terms of art or commerce, writing in cypher, obsolete terms, and the like, create an ambiguity. Here the evidence of persons skilled to decipher or to explain is always admissible.—*Ib.* § 634.

618. So again we must discriminate between *inaccuracy of expression* and ambiguity. If, for instance, a testator having one *leasehold* house in a given place, and no other house, were to devise his *freehold* house there to A B, the description, though inaccurate, would occasion no ambiguity. If, however, a testator were to devise an estate to John Baker of Dale, the son of Thomas, and there were two persons to whom the entire description accurately applied, this description, though accurate, would be ambiguous.—*Ib.* § 635.

3rd. Where parol evidence is offered to subvert a written instrument, that is to say, to show that it really never had any legal existence, such evidence is admissible to show that on account of some fact proved, the entire instrument is worthless, thus—1st. That the instrument is founded on fraud. 2nd. That it was made in furtherance of some object forbidden by the law, or upon some immoral consideration. 3rd. That it was obtained by duress. 4th. That the party was affected by any other legal disability from entering into the contract, as infancy, marriage, insanity, idiocy, intoxication. 5th. That there was never any, or that there has been a total failure of consideration. 6th. That the deed has been

delivered as an escrow or mere scroll, to hold until a given event shall have arisen. 7th, and lastly that it has been subsequently totally waived or discharged. There can be no question that the evidence is admissible for the purpose of showing that an agreement, though unconditional on its face, had in fact never any legal operation.—*Ib.* § 637 to 652. See also *I. H. C. R.* 312 and *II. Ibid.* p. 174. *Smith's L. C. 5th Ed.*, 2nd Vol., p. 669.

The Court of Equity will entertain jurisdiction to reform all contracts, where a fraudulent suppression, omission, or insertion of a material stipulation exists, notwithstanding to some extent it breaks in upon the uniformity upon the rule, as to the exclusion of parol evidence to vary or control contracts.—*Stor. E. J.* § 154—5.

619. Where a written contract omits mention of consideration, but there has, in fact, been a consideration, its existence may be proved by parol evidence.—*N.* § 647.

620. Where parol evidence is offered *in aid* of a written instrument, it is always admissible to give effect to a written instrument by establishing its authenticity, or to apply any instrument to its subject-matter, and to explain words in the ancient charters and mercantile terms.—*Ib.* § 656—660.

621. Where there is a well-known prevalent custom with respect to a thing, and a contract made about that thing is entirely silent as to such custom, it is to be presumed that the parties contracted with reference to such well-known custom, and the inference from the silence is, that they intended their contract to be read subject to such custom. Hence, parol evidence of such custom is receivable in aid of the instrument.—*Ib.* § 664.

622. But no evidence of custom can be given when the instrument is not silent; for it is, of course, open to the parties to exclude the operation of the custom by express agreement.—*Ib.*

623. Parol evidence is also admissible to rebut a presumption; thus the law presumes that a legacy to a creditor is in satisfaction of a debt; and that a portion advanced to a child is an ademption of a legacy to her. In both these cases, parol evidence may be given to rebut the presumption.—*Ib.* § 667.

624. In certain cases where the writing is only a collateral memorial of a fact, parol evidence is admissible as original and

independent testimony; thus the fact of a marriage may be proved by a witness who was present at the ceremony, as well as by the registry;* and payment of money may be proved orally, notwithstanding the existence of a receipt. Where a document which might have been pleaded as an estoppel has not so been, parol evidence is admissible to contradict the instrument.—*Ib.* § 669—670.

625. Parol evidence may always be given of inscriptions on walls, tombstones, mutual tablets, *sasanums* let into buildings, and the like, which from their nature are incapable of removal.—*Ib.* 67.

CHAPTER XI.

Illegal Contract.

626. A contract entered into by the parties will be void on the grounds of illegality.

627. A contract may be illegal quoad the consideration or quoad the promise. A consideration bad in part is bad altogether. But the promise may be to do several distinct and independent acts, of which some are legal and some are illegal; if so, the promise will be valid in regard to the former, void as to the latter of such acts.—*B. C.* 360.

1. Immoral Contract.

628. Contract for second marriage by a man while the first wife is alive.—Contract to illicit co-habitation.—Contract for rent of lodgings let for the purpose of prostitution, if the lodgings were actually used for immoral purposes; and contracts for price of libellous or immoral pictures or publication, are void.—*S. M.* § 297 to 302.

2. Contracts opposed to public policy.

629. When a contract is said to be void as opposed to public policy, reference is made to that principle of law in accordance with which no subject can lawfully do that which has a tendency to be injurious to the public or against the public good.—*B. C.* 365.

630. The following contracts are opposed to public policy—

1) Contract in restraint of trade is void. (*S. M.* § 304). But a contract in restraint of trade will be good where the restraint is only partial, provided it be reasonable in its extent and founded on legal consideration. Thus if A, a cutler, pays B, who is of the

same profession, the sum of £100 in consideration of a contract made with him by B, whereby B agrees not to sell cutlery manufactured by him within the limits of a certain town, but may sell them out of those limits, the contract will be good and binding on B.—*S. M.* § 305.

2) Contracts which have for their object the creating or securing of a monopoly.—*Ib.* § 307.

3) Contract prejudicial to the revenue of the country.—*Ib.* § 308.

4) Contract to restrain marriage or for marriage brokerage.—*Ib.* § 309.

5) Contract to prevent or impede the due course of public justice.—*Ib.* § 311.

6) Contract to secure certain official services.—*S. D. p.* 159 of 1859.

7) Contract for suppressing evidence, or stifling or compounding a criminal prosecution, or proceedings for felony and the like.—*S. M.* § 312.

631. In a case, the defendant was sued on a bond for £700 which was executed at a time when the defendant and others stood indicted for wilful and corrupt perjury, and had severally pleaded not guilty to the charge. When the trial was about to come on, it was agreed between the prosecutor (the plaintiff) and the parties indicted, that the plaintiff should give to the prosecutor his note for £350 as a consideration for his not appearing to give evidence at the trial, it being further agreed that the bond sued upon should be executed by the defendant, and his co-obligor to the plaintiff, to indemnify him in respect of the note on which he had become liable to the prosecutor. The points considered in that suit were—1st, Whether, on the facts alleged, the consideration for giving the bond was illegal. 2nd. Whether a bond given for an illegal consideration is void at common law *ab initio*. 3rd. Whether, supposing the bond to be void, the facts disclosed in the plea to show that it was so could by law be averred and specially pleaded. On the first point, the Court held the promissory note was void. On the second point, the bond was declared void *ab initio*, because this was a contract to tempt a man to transgress the law, to do that which is injurious to the community. As to the third point,

although it is now objected that a deed cannot be defeated by anything less than a deed, and a record by a record, yet the deed in question being grounded upon a vicious consideration, it strikes at the contract itself in such a manner as shows that in truth the bond never had any legal entity; and the rule that a deed must be defeated by deed of equal strength does not apply.—*B. C.* 288 to 290.

632. A party who suffers an injury involving private damages may, however, enter into a compromise as regards his damages; and an agreement to pay money to induce a party *not* to appeal, is not illegal.—*S. M.* § 60.(K.)

633. Contracts for maintenance of suit, *i. e.*, where one who has no lawful interest in a suit assists parties with money or otherwise to promote litigation and all champerty contracts, *i. e.*, purchasing the right of action of another, are void; but where a party believes on reasonable grounds he has an interest, it will not amount to maintenance of a suit.—*Ib.* § 313, 314.

634. Contract to fight, causing the breach of peace, or to induce a public officer to neglect his duty to evade the provisions of public statute, is void.—*Ib.* § 315—317.

3. *Fraudulent Contract.*

635. All contracts tainted with fraud are void *ab initio* both at law and in equity, unless the party affected thereby chooses to accept and ratify it.—*S. M.* § 318. It has also been held that a vendor legally conveying all his title cannot be sued for the purchase-money, although the title proves defective.—*I. H. C. R.*, 390. See also Smith, *L. C.* 5th Ed., Vol. II., p. 457.

636. Fraud is of various kinds, but there can be no difficulty in saying that whenever any one has by wilful misrepresentation induced another to part with his rights on the belief that such representation was true, this is in the plainest and most obvious sense a fraud which a Court of Justice will not tolerate.—*B. C.* 341.

637. There is, however, a distinction between moral and legal fraud. Moral frauds could not be made available either as ground of action or by way of defence before the Court of law. Thus, a vendor is entitled to sell for the best price he can get, and is not liable at law for a simple commendation of his own goods however worthless they may be, provided he has not made any false statement as to their quality or condition. nor asserted any

thing respecting them which may amount to a warranty in legal contemplation.—*Ib.* 342—3.

638. No action will lie for a misrepresentation unless the party making it knows it to be untrue, and makes it with a fraudulent intention to induce another to act on the faith of it, and to alter his position to his damages.—*Ib.* 345.

639. In order to constitute fraud, three circumstances must combine. It must appear, *first*, that the representation was contrary to the fact. *Secondly*, that the party making it knew it to be contrary to the fact; and *thirdly* and chiefly, that it was the false representation which gave rise to the contracting of the other party.—*Ib.* 348.

640. The mere fraudulent attempt at overreaching is not sufficient to constitute fraud, but it must be an attempt so far successful as to have operated as an inducement to the other party to contract.—*Ib.*

641. Great care is often requisite in discriminating accurately between three classes of cases. 1. Where fraud is involved. 2. Where warranty has been given. 3. Where a representation or statement has been made erroneous indeed, but neither fraudulent nor incorporated with the contract.—*Ib.*

642. There is also a distinction between—1st, Breach of warranty from fraud; 2nd, a mere representation from a warranty.

1) If a man sell a horse, and expressly warrant him to be sound, the contract is broken if the horse prove otherwise. The purchaser in such case relies upon the contract; and it is immaterial to him whether the vendor did or did not know of the unsoundness of the horse. In either case he is entitled to recover all the damages which he has sustained by reason of the breach of that contract. A warranty extends to all faults known and unknown to the seller.—*Ib.* 353.

Where the vendor says to the purchaser, "I do not know whether the horse is or is not sound, and therefore will not warrant him; all I can say is that I have long owned him, and know of no unsoundness;" here manifestly is no warranty, and, if the vendor spoke the truth, no fraud.—*Ib.*

If, however, the vendor can show that the horse was unsound, that vendor knew it to be so at the time of the sale, and that, in consequence of the false representations made by him, the pur-

chaser was defrauded, the vendor would be liable, not for the breach of contract of warranty, for he made no such contract, but for making representations which he *knew* to be false. In such cases, the guilty knowledge of the vendor would constitute an essential ingredient in the fraud, and in an action against him should be both alleged and proved.—*Ib.*

The above example is an express warranty. There is also a distinction between fraud and the breach of an implied warranty. Thus, if A orders B, a tradesman, to make an article well known in the trade, and of which the use is understood, B, on supplying it, must be presumed to mean and undertake that it shall be reasonably fit for the particular purpose for which he knew that it was intended. In this case, the party who impliedly warrants will be bound by his warranty, and liable for breach of it without proof of fraud or of the scienter.—*Ib.* 354.

2) The distinction between warranty and representation is this. A representation intended by the vendor as a warranty, and acted on as such by the vendor, amounts in law to a warranty, though made during the treaty for sale and some days before the sale was finally agreed upon.—*Ib.*

When, however, negotiations have actually terminated in a written contract, the parties thereby tacitly affirm that such writing contains the whole contract between them, and no new terms are allowed to be added to it by extenious evidence.—*Ib.*

Where the contract between the parties has not been reduced into writing, the test for determining whether a statement made by one of them does or does not amount to a warranty will be, Was it made pending the contract? Was it intended, and reasonably and *bonâ fide* accepted as a warranty?—*Ib.* 356.

What is said before the sale amounts to a representation only, and not to a warranty, and a defendant could not be liable for a mere representation, although contrary to the fact unless it were fraudulently made.—*Ib.*

A mere expression of opinion or of intention will not be deemed tantamount to a warranty: and further, in order to be operative as such, the representation relied upon must be shown to have been made *pending the contract*.—*Ib.*

643. Generally speaking, a misrepresentation as to fact, the truth of which a party or his agent has an opportunity of ascer-

taining, or the concealment of a matter which an individual possessed of ordinary sense, vigilance, or skill might discover, cannot constitute fraud.—*S. M.* § 320.

644. The misrepresentation or concealment of a material fact which is the consideration for the contract, and which is peculiarly within the knowledge of the party who misrepresents or conceals the same, will constitute fraud.—*Ib.* § 321.

645. Any transaction which a party may be induced to enter into on the faith of several representations made by another, will be void if any one of those representations be fraudulently made.—*Ib.* § 322.

646. A fraudulent contract can be void in so far as it affects the rights of third parties, but cannot be pleaded by the parties to the contract to avoid their own liability thereto, "for no man shall be allowed to take advantage of his own wrong."—*Ib.* § 323.

647. A person whose title to a Bill of Exchange is defeasible on the ground of fraud, may still confer a title to such bill on an innocent third party, who may in his turn confer a title thereto even on one who has notice of the original fraud, provided he was no party thereto.—*Ib.* § 324.

648. A bill or note will be void in toto even where the consideration thereof is but partly illegal; this will not however deprive a plaintiff of his right to recover without using the bill or note, the remaining portion of the consideration which is legal.—*Ib.* § 325.

649. Any material alteration in a written contract by one of the contracting parties, or by a stranger, or an alteration by one of the contracting parties even in a part which is immaterial, will avoid it in toto, provided the alteration in either case is made without the consent of the other contracting party.—*Ib.* § 326.

Any unauthorized and material alteration of a bill of exchange or promissory note will, unless satisfactorily accounted for, avoid the instrument, whether such alteration be made by the holder himself or by a stranger; for "no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected." And "*a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state.*" If he omits to do so, and thus loses his remedy, he

has no right to complain, since an alteration cannot be made in the instrument except through fraud or laches on his part.—*B. C.* 499.

4. *Contracts opposed to Statutes.*

650. What is done in contravention of provisions of an act cannot be made the subject-matter of an action. Where a contract which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no Court will lend its assistance to give it effect.—*Ib.* § 359.

651. Agreement by way of gambling or wagering is null and void by Act XXI of 1848. (*S. M.* § 328.) A peculiar case came before me (*O. S. No. 340 of 1863*) founded upon a contract by which the defendant bound himself but failed to shew Hindu Law within one month to the effect that the manner in which the plaintiff performed opanayana ceremony to an aspen tree was illegal. Plaintiffs sought to recover damage as agreed to by the defendant, who asserted that the contract is opposed to law as it is a wagering one. I held the contract not illegal, for we are told that all wagers were not necessarily void at common law, but only those which, by injuring a third person, disturb the peace of society, or which militate against the morality or sound policy of the kingdom. In such cases, the question is, whether the wagers are one capable or incapable of solution. If former, the contract is good, (*Smith L. C. 5th Ed. 242—3.*) Agreement for lotteries not authorized by Government is void by Regulation V of 1844. But an agreement which is called in this country "*Coory contract*" whereby a number of persons propose to subscribe a monthly sum, and each of the subscribers in their turn, as determined by lot, taking the entire subscription for one month, is not a lottery.—*S. M.* § 329 (*B*).—*I. H. C. R.*, 448.

5. *Contracts without consideration.*

652. The maxim of law is "No action arises from a bare agreement." A gratuitous undertaking may indeed form the subject of a moral obligation, and may be binding in honor, but it does not create a legal responsibility. So when a man simply promises to pay another 50 rupees, no action will lie to recover the money promised, because there was no consideration for the promise.—*N.* § 646.

653. Consideration may be either a *good* or a *valuable*. The former is such as that of blood, or of natural love and affection, as

when a man grants an estate to a near relative, being influenced by motives of generosity, prudence, and natural duty. Deeds made upon this consideration are looked upon by the law as merely *voluntary*, and although good as between the parties, are frequently set aside in favor of creditors and *bonâ fide* purchasers. On the other hand, a valuable consideration is such as money, marriage, or the like; and this is esteemed by the law as an equivalent given for the grant, and makes the conveyance good as against a subsequent purchaser.—*B. L. M.*, 671.

654. Benefits, however small, loss or inconvenience suffered or labor undertaken however trifling, will be deemed sufficient consideration. The Court will not enquire into the adequacy of consideration, but will leave the parties to make the bargain for themselves.—*S. M.* § 338—9. *B. C.* 371. *Ruling*, p. 181.

655. The following few general principles may serve to show what would amount to a valid consideration to support a promise.—*S. M.* § 341.

- 1) Forbearance to institute proceedings where there is well founded claim, will be sufficient consideration for the promise of the debtor or even a third person to pay a debt.
2. The fact of entrusting a person with property is a consideration sufficient to bind him to his promise to discharge the trust faithfully.
3. The assignment of a debt is a consideration sufficient to bind the assignee's promise, although the debt may be of an unascertained amount.
4. A consideration which has for its object the prevention of litigation and settlement of disputes between parties is sufficient to support a promise; thus, a *razeenamah* wherein one of the parties promises to pay the other a certain sum of money should the suit be withdrawn, will be valid, (independently of its being a contract of record) because the ending of litigation thereby is a good consideration for the promise made.
5. A mere promise to do something at a future period, even without performance of that promise, is a sufficient consideration.
6. A mere moral obligation to do a thing will not be sufficient to support a promise; thus, a pecuniary benefit voluntarily conferred by one person upon, and accepted by another, is not a sufficient consideration to support an action, on a subsequent express promise by the latter to reimburse the former.
7. A consideration which is partially illegal will avoid the entire contract, but if one out of several considerations for a promise be merely frivolous or insufficient without being illegal, this will

not avoid the contract in toto, provided the other considerations be adequate.

656. Considerations may be also past and executed at the time the promise is made; it may be concurrent, *i. e.*, made or given contemporaneously with the promise, or it may be continuing, as in the relation between landlord and tenant, the relation being a sufficient consideration for the promise of the tenant to manage the farm in a husband-like manner, or it may be executory, as where A promises to do something in consideration of a promise from B to do some other act, on a future day specified by him.—*S. M.* §. 342.

657. A man may, without consideration, enter into an express covenant under hand and seal; and as Blackstone tells us, if a man enters into a voluntary bond, "he shall not be allowed to aver the want of a consideration, in order to evade the payment; for every bond, from the solemnity of the instrument, carries with it an internal evidence of a good consideration;" so that Courts of Justice will support it, in the absence of fraud, as against the obligor himself, though not, in general, "to the prejudice of creditors or strangers to the contract."—*B. C.* 297.

658. The rule in respect to the *onus probandi* on an issue taken upon a plea of 'no consideration' to an action on a bill, has thus been stated by Lord Abinger, *C. B.*, "where there is no fraud, nor any suspicion of fraud, but the simple fact is that the defendant received no consideration for his acceptance, the plaintiff is not called upon to prove that he gave value for the bill;" but if the bill be connected with some fraud, and a suspicion of fraud be raised from its being shewn that something has been done with it of an illegal nature—as that it has been clandestinely taken away, or has been lost or stolen,—the holder will be required to shew that he gave value for it. If, indeed, in an action by indorsee against acceptor of a bill, the ground of defence be that the bill was obtained illegally from the defendant, and endorsed to the plaintiff without consideration, the defendant will be bound in his plea to aver both the illegality and want of consideration; and if at the trial he proves the illegality, such proof will, according to the rule above stated, throw upon the plaintiff the onus of shewing that he gave consideration for the bill.—*Ib.* 497.

6. *Penalty Contract.*

659. Although the express terms of a contract constitute the law by which the rights of the contracting parties must be regulated, it is not competent for them to attach to their engagements qualities not *recognized by Law as inherent in them*, any more than it is competent to a man capriciously to attach conditions to land, which are opposed to the doctrines or spirit of Law. (*B. C.* 443.) Thus an agreement by a married woman that she will not avail herself of her coverture as a ground of defence to an action on a personal obligation which she has incurred would not be valid or effective in support of the plaintiff's claim, and by way of answer to a plea of coverture.—*B. L. M.* 621. *n*

660. Contracts to which a penalty is attached are not absolutely illegal but of an intermediate nature, and effect will be given to them only upon equitable principles. Wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument; and the penalty is deemed only as accessory, and therefore, as intended only to secure the due performance thereof or the damage really incurred by non-performance.—*S. M.* § 347—8.

661. Where it can be ascertained that compensation can be made for a breach of contract containing a penal clause, Courts of Equity will interfere and relieve the party upon payment of principal and interest, but where compensation cannot be made the Courts will not interfere.—*Id.* § 349.

662. The true foundation of the relief in equity in all these cases is, that as the penalty is designed as a mere security, if the party obtains his money or his damages, he gets all that he expected, and all that in justice he is entitled to; supposing A rented a house of B, and the contract between them were to the effect that B should keep the house in proper repair, and that unless he did so he would be liable to a penalty of £10; if then B failed to get the house repaired and A had recourse to a Court of Equity to enforce the penalty, the Court will decree so much of the penalty as would cover the expenses for repairs and no more. (*S. M.* § 351.) So if a man, in consideration of an immediate loan of £50, binds himself in a penalty of £100 to repay the £50 within a year, and makes default, the Court will require him to pay the £50 with interest only.—*B. C.* 264.

663. In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty, in case of his omission to do a particular act, (the real object of the parties being the performance of the act,) that, if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury to the other party. If it be said that it is his own folly to have made such a stipulation, it may equally well be said that the folly of one man cannot authorize gross oppression on the other side. And law, as a science, would be unworthy of the name, if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side; and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience on the other. There are many cases in which Courts of Equity interfere upon mixed grounds of this sort. There is no more intrinsic sanctity in stipulations by contract than in other solemn acts of parties, which are constantly interfered with by Courts of Equity upon the broad ground of public policy, or the pure principles of natural justice. Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose, as it would be to allow him to substitute another for the principal obligation. The whole system of equity jurisprudence proceeds upon the ground, that a party, having a legal right, shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression, or harsh and vindictive injury.—*Stor. E. J.* § 1316.

664. Conditions are divided into four classes: 1. Those which are possible at the time of their creation, but afterwards become impossible either by the act of God, or by the act of the party. 2. Those which are impossible at the time of their creation. 3. Those which are against law, or public policy, or are *mala in se*, or *mala prohibita*. 4. Those which are repugnant to the grant or gift, by which they are created, or to which they are annexed. The general rule of the common law in regard to conditions is, that, if they are impossible at the time of their creation, or afterwards become impossible by the act of God, or of the law, or of the party, who is entitled to the benefit of them, (as, for example, the feoffor of an estate, or the obligee of a bond,) or if they are contrary to law, or if they are repugnant to the nature of the estate or grant, they are void. But, if they are possible at the

time, and become subsequently impossible by the act of the party who is to perform them, then he is treated as *in delicto*, and the condition is valid and obligatory upon him.—*Ib.* § 1304.

665. If a mortgager gives a bond with a penalty as well as a mortgage for the security of the debt, although the creditor suing on the bond can recover no more than the penalty, yet if he sues on the mortgage, a Court of Equity will allow him interest though it should exceed the penalty, because the bond is merely a collateral security.—*S. M.* § 353.

666. In mortgages, the particular terms or wordings of the conveyance is unimportant. Where the original intentions of the parties in transferring an estate is that the property so transferred should be held as security for money or any other incumbrance, whether this intention is apparent from the same document of transfer or any other, it will in equity be considered as a mortgage and therefore redeemable upon fulfilment of the condition stipulated, and even parol evidence is admissible in such cases as those of fraud, accident, mistake, &c., to show that a conveyance was intended as a mere mortgage.—*Ib.* § 354.

667. The following are the rulings of the Sudder Udalt regarding the conditions of mortgages—

1) A person who has lent money on the security of land can only recover the principal sum and interest, though by a condition in the bond the land itself may have been legally forfeited.—*S. D.*, p. 142—191 of 1859.

2) A condition in a bond that if money borrowed be not paid within a given time the borrower's house shall become the property of the lender, is in the nature of penalty and cannot be enforced in equity.—*Ib.* 59. A mortgage deed conditioned that if the principal amount were not re-paid by a certain day, the mortgage should only be redeemed by payment of *one mura* of rice for each rupee of mortgage money was held unreasonable and unenforceable in equity.—*I. H. C. R.*, p. 81.

3) Generally, a mortgage land will not be forfeited though the mortgager fails to pay the debt on the day appointed.—*S. D.*, pp. 150 and 176 of 1859.

4) A mortgagee will be compelled to deliver possession of the land upon being paid, though after date the mortgage money and interest, notwithstanding that the terms of the bond may import

a conditional sale; (*Ib.* 251) because in a mortgage the money lent does not represent the value of the land.—*Ib.* p. 26 of 1860.

5) But where there is an express condition in a mortgage bond, that in the event of the mortgagor desiring to sell the land the mortgagee should have the right of pre-emption, such condition is valid.—*Ib.* p. 21 of 1858.

6) Where it was stipulated in the bond that, in the event of the mortgage debt not being paid by a certain day, the mortgagee should have the option of advancing a further sum and purchasing the title, the owner's right to redeem it ceased at such date.—*Ib.* 151 and 249 of 1858.

7) The Courts will give effect to a deed of conditional sale, *i. e.*, a deed whereby land is transferred and money borrowed thereon, on condition that if the land is not redeemed within a certain time, it becomes absolutely the property of the mortgagee.—*S. M.* § 355.

8) If a mortgagor voluntarily carry into effect the stipulation for foreclosure, the Courts will respect the arrangement.—*S. D.*, p. 262 of 1858.

9) A mortgage must be discharged in its original integrity; but if the mortgagee himself throws impediment to do so, it is open to parties to such a mortgage deed to pursue their respective rights only. Suppose, for instance, six brothers jointly mortgaged a land to A, but subsequently two of them sold a portion of it to the said mortgagee. Here the four persons who were not joined in the sale may claim their *share* of the mortgaged property.—*Ruling*, p. 150.

10) A bond, the amount of which was stipulated to be paid at the time of cancelling the first mortgage, is not a mortgage bond.—*S. D.*, p. 77 of 1857.

11) But if such bond be one which is called in this district "Gonchoo Bond," and to be liquidated in the same manner as the original mortgage, on the responsibility of land, such bond is, of course, an addition to the first mortgage.—*Decree of Mangalore Civil Court*, A. S. No. 340 of 1859.

12) Where it was expressly set out in the bond that the land should not be redeemable for 15 years, it cannot be redeemed within that period without the consent of both parties.—*S. D.*, p. 28 of 1859.

13) Where a bond contained stipulation that out of its amount a part should be remitted provided the defendant paid the balance due in three annual instalments, and the defendant agreed to pay the sum conditionally remitted in the event of his failing to fulfil these conditions, the Sudder Udalt held that such conditions cannot legally be viewed in the light of a penalty.—*S. D.*, p. 32 of 1861. See also *I. H. C. R.*, 208.

7. *Contracts between parties labouring under legal disabilities.*

668. We may consider this subject into—1, *Non-mercantile*; and 2, *Mercantile persons*.

669. Disabilities to contract by Non-mercantile persons are—
1, Lunacy; 2, Infancy; 3, Marriage; 4, Intoxication; 5, Duress; 6, Aliens.

1. *Lunatics.*

670. Lunatic is one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reason. A lunatic is incapable of contracting where the obligation arises from an express assent, because he is incapable of assenting. (*S. M.* § 88 & 89.) They are however liable for the price of necessaries, i. e., things suited to their state and degree, and actually supplied to and enjoyed by them. (*Ib.* § 90.) When a contract is entered into by a person who is apparently of sound mind, and not known to be the contrary, and the contract is executed, and the subject-matter thereof enjoyed and cannot be restored, such contracts cannot be set aside by the alleged lunatic or his relatives. (*Ib.* § 91.) A lunatic will be bound by a contract if entered into at lucid intervals.—*Ib.* § 92.

671. The law presumes every one to be of sound mind till the contrary is proved, and therefore the *onus probandi* rests with the party pleading lunacy; but once this is established, the onus of proving that a contract was entered into during a lucid interval rests with the party who would set up such a plea. (*S. M.* § 93.) Imbecility of mind will not be a sufficient plea to invalidate a contract unless it amounts to an absolute privation of the reasoning faculties.—*Ib.* § 97.

2. *Infants or Minors.**

672. Under the English law, a person does not attain majority till 21; under Hindoo law, at the age of 16, both males and females. But in respect of minors under the Court of Wards,

* See Act IX of 1861.

at the age of 18. Among Mahomedans, majority is attained at puberty.—*Ib.* 99 to 102.

673. Contracts entered into by minors are generally considered void; but such contracts are distinguished as under—

1) *Absolutely binding*.—Where the contract is a matter of benefit to an infant, as for necessities, either for ready money or for credit. (*Ib.* § 105.) Necessaries are those without which an individual cannot reasonably be supposed to exist; such as meat, drink, apparel, necessary physic, lodgings. Education and instruction (in art or trade,) intellectual or moral and religious, are also necessities. In short, all such articles as suitable to the said infant's age, state, and degree, are necessities.—*Ib.* § 106. *B. C.* 591.

2) *Absolutely void*.—If the contract is for mere articles of luxury, or of purely ornamental, such as charitable assistance to others, it is void. An infant cannot bind himself in an obligation or other writing with a penalty for the payment of any of the necessities; and such obligation shall not be binding. A cognovit given by an infant authorizing an attorney to appear for him and confess an action brought against him for necessities furnished to him by the plaintiff with an undertaking not to bring a writ of error, &c., was held to be invalid, and was ordered to be taken off the file and cancelled upon three grounds; 1, that an infant cannot appoint an attorney; 2, that he cannot state an account so as to bind himself; and 3, that he cannot do any act to prejudice his rights. So a contract by an infant binding himself to serve during a certain time for wages, but enabling the master to stop the work whenever he chose and to return the wages during stoppage, was held to be inequitable and wholly void.—*B. C.* 587—8.

3) *Voidable*.—Contracts are those entered into by an infant, and good until dissented to, or which may be ratified or set aside at the infant's option on his attaining his full age. (*S. M.* § 109.) If ratified, the ratification must be in writing and signed by the party who ratifies, except as regards natives to whom this principle will not apply. The ratification must be made voluntarily, and not obtained by circumvention, nor extorted by threats. Again, the ratification must be made under a full knowledge that he is not bound to ratify a contract made by him during minority.—*Ib.* § 110.

674. An infant on attaining his full age will be considered

by law to have ratified a contract made during infancy, unless a disagreement or waiver in respect to such contract takes place within a reasonable time after he attains his full age; thus, if an infant held shares in a Railway Company and after attaining his full age paid the dividends, attended meetings held by the Company, &c., he would thereby have ratified his contract as a shareholder, and will be bound by it.—*Id.* § 111.

675. An infant who represents himself to be of full age and thus induces an adult to enter into a contract with him, cannot be made answerable *in case*, and where the cause of action is founded on contract, it cannot be shaped into a declaration of tort as against an infant; thus, if A, an infant, hired a horse of B, a livery stable-keeper, and while riding out he met with an accident whereby the horse was much injured, A cannot be held liable for the injury in an action on tort, the original transaction being one based on contract.—*S. M.* § 112.

676. As a general rule, infancy is a personal privilege given as a shield not as a sword, and it never shall be turned into an offensive weapon of fraud or injustice. It was declared by the Court of Sudder Udalt that it is the duty of the Court to take care that when minors come of age they do not defraud others by endeavouring to cancel arrangements which have been made in good faith during their minority.—*Id.* § 113 (*V.*) *B. C.* 587.

677. The principle that a contract must be mutually binding will not apply to contracts entered into with infants; for, although the contract of an infant be voidable, it shall bind the other party with whom the contract is made; thus, if C, a girl under age, and D, an adult, mutually make a promise of marriage to one another, D will be bound by the promise and can be sued for breach thereof, whereas C, being an infant, will not be bound by her promise, and cannot be sued if the refusal was on her side.—*S. M.* § 113.

678. Where a contract is entered into jointly by two or more parties one of whom is an infant, an action on such a contract should be brought against the adults only, the infant being exempted from liability.—*Id.* § 114.

679. Although, as a general principle, a contract made with an infant will not bind him, still if the terms of the contract have been fulfilled and money paid thereon by the infant, the plea of infancy will not entitle him to recover back the money.—*Id.* § 115.

680. At common law, money lent to an infant for necessities and applied by him to that purpose cannot be recovered from him ; but equity will afford remedy and hold the infant liable in such a case.—*Ib.* § 116.

681. Under the Hindoo law, contracts are sometimes entered into in behalf of an infant by others, and such contracts, if made *bonâ fide*, will bind the infant after he attains full age. (*Ib.* § 117.) Thus, an infant will be bound by a division of property if it is in itself legal ; and although a minor cannot himself claim a division, his guardian can do so for him where it is found that the interest of his word is at stake ; and such division once made will bind the infant even after he has attained majority.—*Ib.* § 120.

682. An infant will be bound also by any bond executed, or mortgage of property, &c., made by the managing member of a family, provided the transaction was *bonâ fide* and for the benefit of the family.—*Ib.* § 121.

3. Married Women.

683. Except under certain special circumstances, all contracts entered into by a married woman are absolutely void. (*Ib.* § 124.) Contracts as they relate to married women must, however, be viewed ; 1, As to contracts made before marriage ; 2, As to contracts made during coverture. (*Ib.* § 126.) Where a contract is made by a woman before marriage, and she marries whilst the terms of the contract remain unfulfilled, the husband will be liable jointly with her ; and a suit based upon such a contract must be brought both against the husband as well as the wife.—*Ib.* § 127.

684. Contracts entered into by a woman after marriage must be considered—1. As regards their effect upon herself. 2. As regards their effect upon her husband. Contracts which profess to bind a married woman will bind her only to the extent to which she has property to satisfy, and not beyond ; *i. e.*, her person cannot be arrested.—*Ib.* § 128—129.

685. Contracts entered into by a married woman as professing to bind her husband, can bind him only so far as she had his authority to contract ; or, in other words, when she contracted as *agent* for him ; so that a party seeking to charge him in respect to such a contract is bound to prove either an express assent on his part, or circumstances from which an assent may be implied.—*Ib.* § 130.

686. The circumstances under which a married woman has an implied authority to bind her husband for necessities may be classified as under.—*B. C.*, p. 601.

1) Where the husband and wife are living together, and the husband provides the wife with necessities, the husband is not bound by contracts of the wife, even for necessities, unless there be reasonable evidence to show that the wife has made the contract with his assent, viz., if he has seen her habitually wearing expensive articles of dress without expressing disapprobation, or if he has adopted and ratified her act. (*B. C.* 602.) But in regard to orders given by the wife in those departments of her husband's households which she has under her control, it may be inferred that the wife was agent for her husband unless or until the contrary appear. So for articles necessary for the wife, such as cloths. But not so if the order is excessive in point of extent, or if, when the husband has a small income, the wife gives extravagant orders. The tradesman who supplies goods to a married woman will, if the bill is one of an extravagant nature, such as the husband would never have authorized, run the risk of losing his money, because, from the extravagance of the order, the inference of agency may be rejected. It is the bounden duty of tradesmen, when they find a wife giving extravagant orders, to give notice to the husband immediately if they mean to hold him liable.—*Ib.* 603.

2) Where the husband and wife are living together, and the husband will not supply his wife with necessities, or the means of obtaining them, she is at liberty to pledge her husband's credit for what is strictly requisite for her own support.—*Ib.*

3) Where the husband and wife are living apart by mutual consent, and the husband makes the wife a sufficient allowance for her support, he is not liable to a tradesman for goods supplied to her; and whether the tradesman knew of such allowance or not, is immaterial. The question is only, has the husband given the wife sufficient for necessities suitable to his degree.—*Ib.* 604.

4) If the husband has turned the wife out of doors, or by his indecent conduct had precluded her from living with him, and does not give her adequate means of subsistence according to his degree in life and his fortune, the law makes her his agent to order such things as are reasonable and necessary for herself.

5) If a man will not receive his wife into his house, he turns her out of doors; and if he does so, he sends with her credit for her reasonable expense.—*Ib.*

6) When the wife voluntarily abandons and relinquishes her family, by this conduct she renders herself incapable of enjoying the before-mentioned privilege, and places herself without the pale of her husband's maintenance.—*Ib.* 606.

7) If the wife be living in open adultery, her husband is not bound by any contract which she may make even for necessaries, unless there be evidence of condonation on his part, or he forgive her, and receive her back again.—*Ib.*

8) By the marriage contract, the husband takes on himself the duty of supplying his wife with necessaries, that is to say, the wife is entitled to be supported according to the estate and condition of her husband. If she is compelled by his misconduct to procure the necessary articles for herself, as, for instance, if he drives her from his house or brings improper persons into it, so that no respectable woman could live there, he gives her authority to pledge her credit for her necessary maintenance elsewhere, which means that *the Law gives that authority by force of relation of husband and wife*. So that if a husband omit to furnish his wife with necessaries while living with him, she may procure them elsewhere, otherwise she would perish.—*Ib.* 607.

9) If the husband becomes lunatic by the visitation of God, and therefore unable to provide his wife with necessaries, he is in the same situation as a husband omitting to furnish them.—*Ib.* 608.

4. Intoxication.

687. The law is the same with regard to insanity, idiocy, and intoxication. (*N.* § 645.) Although formerly the intoxication of contracting parties was held to afford no ground for repudiating liability upon a contract made by him whilst in that state, or, in other words, no man should be allowed to stupify himself, this has undergone much change lately, that is, a person who has contracted even by deed, whilst so wholly intoxicated as to be deprived of his reasons as not to know the consequence of his act, may successfully dispute his liability in respect of such transaction.—*B. C.* 612.

688. With regard, however, to simple contracts which it is sought to avoid on the ground of intoxication, there is a distinction between *express* and *implied* contracts. Where the right of action is grounded upon a specific distinct contract requiring the

* See also *I. H. C. R.*, p. 372:

assent of both parties and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances; in fact, the law itself makes the contract for the parties. Thus, in an action for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action may lie against the defendant even though he may have protested against such a contract. So a tradesman who supplies a drunken man with necessaries may recover the price of them if the party keeps them when he becomes sober, although account for goods bargained and sold would fail by reason of defendant's intoxication at the time of contracting. It will further be remembered that actual fraud might plainly be evidenced by the conduct of a person taking an obligation from one intoxicated, and then known by the contractor to be so.—*Ib.* 613, and *N.* § 645.

689. A state of partial intoxication merely less in degree than that just indicated would seem, however, in the absence of fraud and unfair dealing, to afford no defence whatever to an action founded upon contract, nor is drunkenness an excuse for crime.—*Ib.*

5. Duress.*

690. The capacity to contract may be wholly destroyed by duress which may be of one or other of two kinds—1, Duress *per minas*, i. e., coercion imposed by fear of loss of life or limb. 2, Duress of imprisonment or confinement of the person in any wise, where a man actually loses his liberty. The keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment. If a man is under duress of imprisonment or compulsion by an illegal restraint of liberty, and he executes a bond or the like, he may allege his duress and avoid the extorted bond. But if a man be lawfully imprisoned, and either to procure his discharge or on any other fair account, executes a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. There can be no doubt that duress of the *person* whether evidenced by threats or imprisonment, will nullify a contract executed under its pressure, and that money paid in pursuance of such contract may be recovered back. It may, however, be considered as doubtful whether duress of *goods* would suffice to avoid a contract whether if the signature to an agreement

were procured by a threat of detention of a person's goods or of injury to them, the agreement thus signed could be repudiated by the party so coerced.—*B. C.* 614.

691. A man under duress of imprisonment, or if the imprisonment being lawful he is subjected to undue and illegal force and privation, and, in order to obtain his liberty, or to avoid such illegal hardship, he enters into a contract, he may allege this duress in avoidance of the contract so entered into; but an imprisonment is not deemed sufficient duress to avoid a contract obtained through the medium of its coercion, if the party was in proper custody under the regular process of a Court of competent jurisdiction.—*N.* § 643, *B. L. M.* 125.

692. Money paid under compulsion or fraudulent legal process, or of wrongful pressure exercised upon the party paying, it may, in general, be recovered back, and an instrument may be avoided which is executed under threats of personal violence, duress, or illegal restraint of liberty.—*B. L. M.* 254, *S. D.* 859, *p.* 142.

But money obtained by compulsion of law, *bonâ fide*, and without taking an undue advantage of the situation of the party paying it, is not recoverable. Money paid with full knowledge of the facts is not recoverable if there be nothing unconscientious in the retaining of it. Money paid in ignorance of the facts is recoverable, provided there have been no laches in the party paying it. Laches, in the sense of a mere omission to take advantage of means of knowledge within the reach of the person paying the money, is not sufficient to disentitle him to recover it back.—*Sm. L. C.* 374.

6. Aliens.

693. Aliens are persons born out of the king's allegiance, *i. e.*, in a foreign state or country, not under the dominion of Great Britain. Aliens are of two kinds; alien friends, and alien enemies. Contracts made with the former will be binding, but will be void if it was one entered into with the latter.—*S. M.* § 170—172.

Mercantile Persons.

1. Principal and Agent.*

694. An agent is one who is entrusted by another, called the

* The paid managers of the affairs of a Pagoda have no power, as such, to encumber the Pagoda property, or to settle large outstanding demands against it. Persons dealing with such managers are bound to enquire into the extent of their authority.—*I. H. C. R.*, 298.

principal, with the management of some business to be transacted in the *principal's name or on his account*, and which business, he (the agent) undertakes to perform and to render an account of it.—*Ib.* § 176.

695. *Agency are of three kinds*—1, *Special*.—An express limited authority given to the agent to do some particular act or to make some particular contract; thus, if I commissioned a friend to purchase a specific thing for me and on my account. (*B. C.* 536.) 2, *General*.—A large authority to make all contracts or to do all acts connected with a particular trade, business, or employment, thus, where my servant orders goods of the neighbour-tradesman for my use without any express instruction from me, but in the usual and admitted course of his duty. (*Ib.* 537.) 3, *Universal*.—An authority to do all acts without reference to the precise character which the principal may personally do, and which he may, without violating the law, do by deputy.—*Ib.*

696. An agency may be created; 1, by express authority; 2, by implication, *i. e.*, by some circumstance from which an agency must necessarily, or may reasonably be inferred, or by the existence of a particular relation between the parties; from which the law will infer an authority to contract.—*Ib.* § 177.

697. There exists an important difference between general and particular agency. If a particular agent exceed his authority, his principal is not bound by what he does; whereas, if a general agent exceed his authority, his principal is bound, provided what he does is within the *ordinary and usual scope of the business* which he is deputed to transact.—*B. C.* 539.

698. A Station Master of a Railway Company could not bind the Company by a contract by surgical attendance on an injured passenger without express authority for that purpose.—*Ib.* 540.

699. A coachman from whose carriage a passenger had fallen and broken his arms, or by which another person had been run over, could not bind his master by a contract with a Surgeon to cure the injured person, and oblige his master to pay the bill.—*Ib.* 541.

700. The authority of agent extends to matters incidental to the subject-matter of agency, thus—

1) An attorney having been once retained in an action, has clearly cast upon him the duty of taking the necessary steps during

its progress, but is not obliged to consult his client or to seek specific instruction from him prior to each successive step in the action. (*Ib.*) But an attorney will not be justified in pledging his client's credit to a bailiff or other officer for fees; which, according to the usual course of practice, he ought, in the first instance, to pay himself.—*S. M.* § 203.

2) A master who sends his servant to buy goods and gives him no money to pay, doubtless authorizes him to pledge his credit; and a person who employs his agent to purchase goods on the usual terms of any particular trade, gives the like authority, and so in other instances.—*Ib.* § 204.

3) A master of a vessel, on the other hand, is impliedly vested with a peculiar power, in urgent cases, to pledge the credit of the owner for repairs done to her, or even to sell or hypothecate the ship and cargo if necessitated to do so; and such contracts entered into by him will, by virtue of his authority as agent for the owners, be binding on them.—*B. C.* 543.

701. An agency determines—1, By express revocation thereof by the principal, or by the agent renouncing the agency himself; 2, By termination of the business for which the agency was created; thus, if A engages B as his attorney to conduct a law-suit, B's authority as agent for A will terminate so soon as the law-suit is brought to a close; 3, By lapse of the specific period agreed upon, either by express agreement or by the usage of trade, for the execution of the business undertaken by the agent; thus, in the case of a guardian and his ward, the former will be considered as a duly authorized agent to conduct all affairs in behalf of his ward till he attains his majority, after which the power of the guardian to bind his ward by his acts terminates.—*S. M.* § 178.

702. A difference obtains in regard to the rights of a principal against his agent in respect to whether the agent is a gratuitous or paid agent; the rule in general being that which governs the rights of a bailor against a remunerated bailee and a gratuitous one.—*Ib.* § 184.

703. A remunerated agent having once engaged, can be compelled to do what he undertook. An unremunerated agent cannot be compelled; but should he, after entering into an engagement, commence with the task, he will be liable for misfeasance in respect thereof.—*Ib.* § 185.

704. Again, less skill will be expected from an unremunerated than from a remunerated agent; the former is, however, bound to use such skill as he possesses and no more, and will be held responsible for gross negligence only. So an omission to use skill by an unremunerated agent, where he holds himself out as possessing such skill by acting in a public or professional character, will amount to gross negligence on his part.—*Ib.* § 186.

705. In general, an agent will be bound to carry out, if possible to the very letter, the instructions given him by his principal, which may be either expressly or impliedly, but an agent will not be bound to act as advised by his principal if by so doing he would make himself the instrument of practising a fraud on a third person.—*Ib.* § 187.

706. An agent will further be liable for all payments actually made to him, and for all losses incurred by his own negligence; thus, if a banker pays £100 belonging to his customer on a forged cheque, he will be obliged to suffer the loss himself and cannot charge his customer.—*Ib.* § 189.

707. An agent will not be liable for losses not arising from negligence which is either actual or constructive, such as by fire, the acts of God, or the Queen's enemies; he is not liable also for losses from robbery or other accidental damage happening without his default.—*Ib.* § 191.*

708. The acknowledgment of a claim by an agent will not operate to take a case out of the Statute of Limitation as against the principal.—*Ib.* § 195.

709. An agent has a right to charge his principal for advances made by him *in the regular course of business*; he cannot, however, charge his principal for advances made out of the regular course of business, and he will not be entitled to re-payment if he conducted himself so negligently as to have incurred expenses which he might have avoided.—*Ib.* § 197.

710. Where an agent professes to deal for himself, but does, in fact, deal for his principal who is unknown at the time, the party with whom the contract is made has the choice of holding either the agent, or the principal when discovered, responsible for the contract.—*Ib.* § 208.

* See also Norton's *Topic of Jurisprudence*, p. 452—4.

711. Where, however, the party does, by some act, show that he had chosen to debit the principal, he cannot afterwards resort to the agent; so also if he chose to look to the agent as the responsible party, he cannot proceed against the principal.—*Ib.* § 209.

712. A third party may, by his negligence, lose his remedy against the principal, and in many cases a deviation from the usages of trade will tend to this; thus, if a person sold certain articles to an agent and was told by the principal to present his bill within two days, but the vender failing to do so, the value of the articles had been paid by the principal to his agent after two days, here the vender having, by his negligence, allowed the day of payment to go by without presenting his bill, loses his remedy against the principal.—*Ib.* § 210.

713. Where an agent professes to deal as agent only in behalf of his principal who is known, he will incur no personal liability to third parties. (*Ib.* § 214.) This principle is, however, subject to certain exceptions depending on the usage of trade and the mutual understanding of the parties which result therefrom, the rule in such cases being reducible to the question—To whom was credit given? Thus, in the case of masters of vessels who contract for repairs or stores, or loans of money for such purposes, credit is primarily given to the masters themselves; so also an agent who effects a purchase for a foreign principal, the agent, it must be presumed, was the party trusted, and therefore the party with whom such agent contracted may hold him responsible for the principal if he chooses to do so.—*Ib.* § 215.

714. If a contract is effected by an agent without naming his principal, he is himself *prima facie* responsible, unless the party with whom he contracted chooses to look to the principal when discovered.—*Ib.* § 216.

715. So where an agent contracts in writing in his own name, he will be held liable on such contract even though the other contracting party knew at the time that he was only an agent in the transaction.—*Ib.* § 217.

716. Again, an agent may contract in behalf of his principal, and yet render himself liable for the due fulfilment of the terms under which the contract was made, notwithstanding the name of the principal is disclosed at the time; thus if A, who is in Calcutta, was instructed by his principal in London to send him a quantity of rice, and A entered into an agreement with B for

the purchase of the rice, promising to pay the value within 8 days, B can hold A liable for payment within the stipulated time, as the terms of the contract show that the agent and not the principal was the person by whom the payment was to be made.—*Ib.* § 218.

717. Where an agent enters into a contract by falsely representing that he was authorized to do so by his principal, though at the same time he knew he had no such authority, he would be liable to an action on the case, and perhaps an action will be against him also on an implied contract by him that he had the authority which he professed to have.—*Ib.* § 219.

718. An agent will likewise incur liability by entering into a contract *bond fide* believing he was vested with authority to do so, when, in fact, he had no such authority, and an action would lie against him for damage resulting from the mis-statement, which would amount to a legal fraud.—*Ib.* § 220.

719. Where a person contracts in writing in the name of another and signs the contract only *as agent* for that other, he cannot be sued upon that contract as a party, unless it can be shown that he was the *real* principal.—*Ib.* § 221.

720. Where a contract is entered into by an agent in behalf of his principal, the latter may, whether his name be mentioned in the contract or not, step forward and take advantage of the contract so made, and hold the other contracting party responsible for its due fulfilment.—*Ib.* § 222.

721. So, if goods are entrusted to an agent for sale, and they are sold only subsequent to the death of the principal who dies intestate, the party administering to the estate may sue the vender for goods sold and delivered.—*Ib.* § 223.

722. Where, however, an agent is permitted by his principal to contract personally for him *under seal*, the principal will have no right to interfere and sue in his own name.—*Ib.* § 224.

723. And where a principal steps forward to take advantage of a contract entered into by his agent in his behalf, he will be bound by the terms under which the contract was effected between the agent and the third party; so that if the third party contracted on the understanding that he was to have a set-off on account of a debt due by the agent to him, the principal will, in taking advantage of the contract, be bound to allow the plea of set-off.—*Ib.* § 225.

724. Although a principal has a right to adopt a contract made by his agent, yet he will not be entitled to sue a third party on a *bare act* of his agent's, such as would raise a duty towards the principal on the part of the third party, and subject that third party to damage for its non-performance, unless the agent was *previously* authorized to do the act. Thus, a demand of payment, to oust the debtor's, plea of tender, must be made by an agent *previously* authorized.—*Ib.* § 226.

725. Where an agent has been allowed to sell in his own name, and payment is made to him in the usual course of business according to the terms of the contract, the principal will be bound by it if he did not, previous to such payment, make a demand that it should be paid to himself.—*Ib.* § 227.

726. But where the agent is a mere broker not having possession of the goods, nor any documents of title thereto, a payment made to him will not bind the principal.—*Ib.* § 229.

727. So, where the vendee is aware that the vender of the goods purchased by him was a factor, he will not, in an action brought by the principal for value of such goods, be entitled to plead a set-off for a debt due to him by the factor.—*Ib.* § 227.

728. A party who appears on the face of a contract as an agent, but is in fact the principal, cannot, in general, sue thereon in that capacity; but if such a contract is in part executed and accepted by the other contracting party, with a knowledge that the party who was described as agent in the contract was the real principal, the latter may, after that, sue in his own name for the completion of the contract.—*Ib.* § 230.

729. An agent may sue a third party on any contract entered into with him in which his principal is undisclosed; but so soon as the principal steps forward and adopts the contract himself, the power of the agent to sue will end.—*Ib.* § 231.

730. An agent may again sue on a contract wherein he has a special interest, whether he contracted professedly for himself or not; thus, an auctioneer who sells goods belonging to others may sue for value thereof, as the special interest he has in it is his commission, &c.—*Ib.* § 232.

2. Partnership.

731. Partnership is a contract founded on consent between two or more persons by which they agree to employ their capital,

skill, and labor in trade or business, with a view to a communion in profit and loss between them.—*Ib.* § 233.

732. Partners are of three sorts—1, Active Partners; 2, Dormant Partners; and 3, Ostensible Partners.—*Ib.* § 234.

733. An active partner is the ordinary, common, and recognized partner in the trade or business which forms the partnership contract.—*Ib.* § 235.

734. A dormant partner is one who vests his money in the partnership-business and receives the profits on his share, but has nothing to do with the actual management of the house, or is at all consulted about its affairs.—*Ib.* § 236.

735. An ostensible partner is the direct converse of the dormant partner; he has *apparently* an interest in the partnership-business, but *really* has none.—*Ib.* § 237.

736. A partnership is presumed to commence from the date of the agreement to become partners.—*Ib.* § 238.

737. Partnership as a contract must be considered—1, As to the rights and liabilities of the partners *inter se*;—2, As to their rights and liabilities with reference to third person.—*Ib.* § 239.

738. A partnership as *between the partners themselves* may be created by a mutual participation of *profit and loss*; but, with reference to *third persons*, a share in the *profits alone* will suffice.—*Ib.* § 240.

739. A partner may give another person an interest in his share, but cannot make him a partner unless accepted by the firm.—*Ib.* § 241.

740. So also the executor of a deceased partner cannot claim to be entertained as a partner unless consented to by the firm, or unless there was a stipulation in the contract of partnership that they shall do so.—*Ib.* § 242.

741. Each partner is the accredited agent of the rest, whether they be Active, Dormant, or Ostensible, and has authority, as such, to bind them either by simple contracts, or by negotiable instruments circulated in behalf of the firm, to any person dealing with them *bonâ fide*.—*Ib.* § 243.

742. Again, a partner can bind his co-partners by contracts incidental or appropriate to the particular trade or business of the firm, in matters within the scope of the partnership dealings.—*Ib.* § 244.

743. A partner cannot bind the firm to which he belongs *by deed*, unless he has express authority *by deed* for that purpose.—*Ib.* § 245.

744. As a general rule, where partnership name is pledged, no matter whether the members are named or not, or whether they be dormant or known parties, each individual member will be answerable *in solido* for the whole amount of the partnership debts, without reference to the proportion of his interest, as between himself and his co-partners.—*Ib.* § 246.

745. Partners may make any arrangements as between themselves with reference to the proportion of each one's share in the profits and loss in the partnership concern, so that it is competent for them to stipulate and bind themselves by the stipulation, that one or more of the members be exempted from all risks but still share in the profits.—*Ib.* § 247.

746. Each partner is impliedly empowered to draw, accept, or endorse bills and other negotiable instruments; provided such be incidental to the particular trade or business of the firm, and in accordance with its common course and usage.—*Ib.* § 248.

747. The implied right of one partner to bind his co-partners by negotiable instruments, is confined only to trading partnerships; such firms as those of attorneys and others who are not by custom or usage parties to negotiable instruments, nor need be so for the purposes of their business, will not be bound by them if negotiated by individual partners.—*Ib.* § 249.

748. Partners are bound to observe the strictest fidelity in respect to one another, and to bring all profits realized by each into partnership-account, so that one partner is not allowed to stipulate for any private advantage at the expense of the rest; if he does so, he will be prevented from enjoying it or be compelled to hold it as trustee for the benefit of all the partners.—*Ib.* § 250.

749. The position of partners in respect to actions at law against one another is somewhat similar to the position of a husband and wife in the same respect. The contract of partnership has been compared, not inaptly, by an eminent Judge, to that of marriage, and one partner therefore cannot maintain an action against his co-partners in respect of the partnership-account.—*Ib.* § 251.

750. The investigation and settlement of partnership-accounts and affairs are peculiarly the province of a Court of Equity; the only remedy for a partner to recover any claims he may have against the others in the partnership-business is, to apply to a Court of Equity for final adjustment of accounts and dissolution of the partnership; but no partner will be allowed to enter an action for any particular transaction between himself and his co-partners with reference to the partnership-business.—*Ib.* § 252.

751. When the accounts of a partnership have been finally adjusted, and a balance struck, one partner will be entitled to bring an action against his co-partners for such portion of the balance as may be due to him.—*Ib.* § 254.

752. The fact of a person being a partner in a firm will not, however, deprive him of his remedy at law against one or more of the co-partners for any private claims he may have against them: thus, a partner may sue his co-partner for money advanced to him before the partnership commenced, and in order to its formation, or for work done for the firm before he became a member of it. So if one partner gives a promissory note for his own private debt in the name of the firm, and his co-partner be compelled to pay that note, the latter will be entitled to recover the amount from the former as money paid to his use.—*Ib.* § 255.

753. A partner who may apply to a Court of Equity for dissolution of the partnership must show valid causes which call for such a measure, and Courts of Equity will enforce a dissolution if there be a flagrant violation of any covenant contained in articles of partnership.—*Ib.* § 256.

754. The liability of a partner commences from the date of his admission into the firm, so that, in general, he will not be liable on a contract effected previous thereto.—*Ib.* § 257.

755. But if he recognizes the existence of such a contract after his admission into the partnership, and receives benefit from it, he may become responsible by virtue of a new contract to the same effect as the old one, which his conduct will be evidence of his having entered into along with his partners.—*Ib.* § 258.

756. Where a bill is accepted in the name of a firm, for a debt which was incurred partly before, and partly after one of the partners joined the firm, the new partner will be liable for

so much of the debt for which the bill was accepted, as accrued subsequently to that time.—*Ib.* § 259.

757. The liability of a partner ceases on the dissolution of the firm or on his retirement from it accompanied by due notice thereof, or by proof of the creditor's knowledge thereof, except in the case of a dormant partner, who need give notice only to those who knew him to be a partner and none others.—*Ib.* § 260.

758. Whatever arrangements partners may make as to the interests and liabilities of each individual member, they will not be binding on third persons, unless they were aware of the existence of such an understanding between the partners, and contracted with the firm on that footing.—*Ib.* § 261.

759. A *dormant* partner will, when discovered, be equally liable in respect to contracts of the firm with third persons, as those who are held out to the world as partners.—*S. M.* § 262.

760. An *ostensible* or nominal partner will also be liable as a partner on all transactions in which third parties engage with, or give credit to, the firm, on the faith of his being a partner; it has even been said that a nominal partner will be liable, although the third party at the time of dealing was not aware that his name was used as a partner of the firm, but this seems questionable.—*Ib.* § 263.

761. A sale or pledge of property belonging to the partnership, by one partner, although without authority of his co-partners, will entitle the purchaser or pawnee to hold such property as against the firm, provided there was no collusion or fraud on the part of such purchaser or pawnee.—*Ib.* § 264.

762. Where one of several partners gives a guarantee, the party seeking to hold the firm liable on such guarantee must prove that it was given with the authority of the co-partners, without which it cannot bind the firm, as it is not usual for partners in the common course of business to give collateral engagements of that sort.—*Ib.* § 265.

763. So also a submission to arbitration by one of several partners will not bind his co-partners. But a deed of release by one partner will bind the firm. Goods obtained through fraud by one partner, cannot be claimed by the firm, notwithstanding there was no privity to the fraud on the part of the others.—*Ib.* § 266—8.

764. Privity of fraud on the part of a third party who deals with one of the partners will deprive him of his claim as against the firm; and where the transaction is not *bonâ fide*, notice to one partner is not impliedly notice to the firm. Money borrowed by a partner on his private credit, and applied to partnership purposes, will not be a partnership debt. A retiring partner will be liable for contracts made by the firm while he continued to belong to it; but if, owing to his death, the partnership is dissolved, his personal representative will not, however, be liable *at law* for such contracts, the rule in such cases being, that personal claims and liabilities survive; but Courts of Equity will consider the estate of the deceased partner liable for the partnership debts.—*Ib.* § 269—271.

765. As the whole firm will be bound by the contract of a single partner, so payment or satisfaction of a debt by one partner is payment or satisfaction by them all, and where one partner is released or discharged of a debt, though the debt be joint and several, it will be a release or discharge as against his co-partners; but a covenant not to sue one partner cannot be pleaded as a release in regard to the rest.—*Ib.* § 272.

766. The whole partnership will be entitled to sue for price of goods belonging to the firm sold by one of the partners in his own name; the buyer will, however, have a right to set off any debt due to him by the single partner.—*Ib.* § 273.

767. A partnership may be dissolved—1. By lapse of time when the partnership is limited to a certain period. 2. By mutual consent. 3. By a decree of the Court. 4. By death of one of the partners. 5. By some fact whereby one of the partners becomes disqualified to be considered as a partner; as where he becomes bankrupt, or an outlaw, or felon, or in the case of a *feme sole* when she marries.—*Ib.* § 274.

CHAPTER XII.

Law of Set-off.

768. Under Section 121 of the Code of Civil Procedure, a defendant may plead a set-off against the claim of the plaintiff for the amount of any debt due to him from the plaintiff; provided that if the sum claimed by the defendant exceed the amount cognizable by the Court, the defendant shall not be allowed to set off the same unless he abandon the excess. The Statute of Set-off was enacted to prevent the necessity of cross action.

769. A claim *exceeding* the amount cognizable by a Court cannot, by merely *giving credit for a set-off*, be reduced so as to bring it properly within the cognizance and jurisdiction of the Court, for a set-off is properly a matter for cross action, and cannot, without the defendant's consent, be deemed equivalent to payment.—*B. C. 61.*

770. A case will not be cognizable by a Court in which the claim exceeding the amount cognizable by a Court is *reduced* by a plea of set-off within that amount; for if it were so, the Court might be called upon to investigate two several claims, each of them far exceeding the limits of its statutory jurisdiction.—*Ib.*

771. If a claim is preferred in a Court for a sum of which it is within the cognizance, and it appears that the debt originally due from the defendant exceeded that amount, but has been reduced below it by payment, &c., before action was brought, the defendant will not, under such circumstances, be entitled to say that the case is without jurisdiction of the Court.—*Ib.*

772. The opportunity extended to a defendant to forego a cross action in respect of the subject-matter of his plea of set-off, is allowable only where there are mutual debts between plaintiff and defendant due in the same right, or (if either party sue or be sued as executor and administrator) when there are mutual debts between the testator and intestate and either party. The right

of set-off exists, notwithstanding that such debts are deemed in law to be of a different nature, unless in cases where either of them accrues by reason of a penalty contained in any bond or deed.—*Ib.* 203.

773. A plaintiff may, however, preclude the necessity of a plea of set-off by giving credit for such cross demands as his opponent may otherwise have made the subject of a plea of this nature. (*Ib.* 204.) For further particulars, see Smith's Leading Case, p. 258 to 269 ; and II. H. C. R., p. 296.

THE END.

APPENDIX I.

RULES OF PRACTICE FOR THE COURTS IN THE MADRAS PRESIDENCY.

ADMISSION.

Mere suspicion of collusion with the plaintiff will not justify the Court in refusing to give judgment (under Section 114 of the Code of Civil Procedure) against a defendant who has admitted the plaintiff's claim, provided fraud be not actually proved.—S. Dec. 1852, p. 89.

Where execution of the bond sued on is admitted by the defendant, the plaintiff need not be called upon to prove his claim, but the defendant may show that he ought not to be bound by the terms of the bond.—Ib. 1855, p. 120.

AGENTS.

No person can be allowed to make applications or appearances as the recognized Agent of a party, under Clauses 1 and 2, Section 17 of the Code, unless the party himself be ordinarily residing *out of the Court's jurisdiction*, and the Agent hold a *general* Power of Attorney.—S. Proc., 21st April 1860.

An Agent, merely empowered by a party to conduct a *particular case*, cannot be heard, or allowed to make any application to the Court, unless the party be an officer or soldier.—Cl. 1 and 2, Sec. 17, and Secs. 19 and 20, Act VIII of 1859.

If a defendant in a suit be proved to be deranged, his future heir, or the person managing his affairs, may be permitted to appear and act on his behalf.—S. Proc., 4th September 1855.

APPEALS FROM DECREES.

No memorandum of appeal can be received under Section 335 of the Code, unless it be accompanied, *at the time of presentation*, by an authenticated copy of the decree appealed against.—Ib. 18th July 1860.

Under Section 335 of the Code, the appellant is only required to produce, with his memorandum of appeal, a copy of the *decree* appealed against, and need not produce copy of the judgment.—Ib. 6th September 1860.

No application for the admission of a special appeal can be received under Section 373 of the Code, unless it be accompanied, *at the time of pre-*

sentation, by authenticated copies of the judgments and decrees of the Lower Appellate Court, and Court of First Instance.—Ib. 18th July 1860.

The period limited for appealing will be reckoned from the date on which the judgment was pronounced, provided that, if application for a copy of the decree be made within the appeal time, a day will be added for every day's delay in furnishing such copy which may not be attributable to the party.—Ib. 6th September 1860.

Where a party fails to put in a sufficient number of stamps with his application for a certified copy of any decree or order, any delay which may occur in producing the remaining stamps, after notice to produce the same, will be attributable to the party, in calculating the time limited for appealing.—Ib. 21st April 1860.

If, in the case of authenticated copies which may be given on plain paper, the whole quantity of paper required be not produced with the application, any delay which may occur in producing the rest, after notice, will be attributed to the party in calculating the time limited for appealing.

In calculating the time for appealing under Section 333 of the Code, the Courts are not to take the corresponding date in the calendar month, but to reckon the *number of days* allowed by the Code.—Ib. 6th September 1860.

When the period limited for appealing may expire between any two Court days, the appeal will be considered to have been put in within time, if presented on the Court day next succeeding the date so limited.—Ib. 30th November 1831.

Where such time may expire during the adjournment of the civil side of the Court, the memorandum of appeal will be considered to have been put in within time, if presented on the day on which the Court is re-opened.—Ib.

The period occupied in disposing of an application for review will be added to the time allowed for appealing, provided such application shall have been put in before the expiration of the appeal time.—Ib. 6th September 1860.

No extension of the time limited for appealing can, under Section 333 of the Code, be granted *beforehand* for the purpose of preparing an appeal: any party desiring to present an appeal after the expiration of such limited time, is to put in the appeal, with a petition on the usual stamp, explaining the cause of delay, and praying the Court to receive his appeal.—Ib. 21st April 1860.

The costs are to be excluded from the calculation, in determining whether the decree of a lower Court is appealable or otherwise.—Ib. 5th November 1829 and 11th July 1845.

The costs adjudged by the lower Court are not to be considered as part of the amount in issue in appeal, notwithstanding that a merely nominal sum may have been decreed exclusive of costs.—Ib. 5th December 1860.

If a memorandum of appeal be returned under Section 336 of the Code merely for correction, the same memorandum may be corrected and put in again, and no fresh stamp will be necessary.—Ib. 1st October 1860.

If the memorandum of appeal be *rejected* under Section 336 of the Code, it is of no further use; but a fresh memorandum on a new stamp may be presented, provided it be put in within the time allowed for appealing.—Ib.

An appellant will be entitled to be heard on any new objection introduced into an amended memorandum of appeal, if it be put in before the expiration of the time limited for appealing, but not otherwise.

Under Section 348 of the Code, no written *answer* can be received from a respondent, and under Section 122 no *written statement* of the respondent's case can be either received or called for by the Appellate Court.—Ib. 19th March 1860.

Objections cannot be received in writing from respondents under Section 348 of the Code; they must be urged orally at the hearing, and should be noted down by the Judge, and set forth in the judgment among the points for determination in the appeal.—Ib.

A decision of a District Moonsiff awarding maintenance is subject to appeal, as involving the eventual payment of a larger sum than twenty rupees.—Ib. 12th June 1840.

The alteration in the law made by Regulation V of 1825 affects only the "suits for land" spoken of in Section XLIII, Regulation VI of 1816, and not those for other real property, or for property simply savouring of the realty. Decrees of District Moonsiffs in suits of the latter kind are therefore final where the amount or value does not exceed twenty rupees; and a suit to establish a right to certain shares in a tamarind tree is of this description.—Ib. 13th November 1860.

The revised decree in a remanded suit takes the place of the first decree and any party dissatisfied therewith may appeal against it.—Ib. 3rd December 1844.

If an appeal be privately adjusted prior to judgment being pronounced the deed of adjustment must be put in by the parties in the Court in which such appeal is pending.—Ib. 1st May 1861.

The Courts have no authority, under any law, to fine an appellant (or a respondent, S. D., p. 146 of 1860) for preferring a litigious appeal.—S. D. 1861, p. 16.

The Appellate Court will be at liberty to call upon the lower Court to explain, justify, or otherwise account for any part of its decree, or any omission appearing therein, and to take the reply into consideration in disposing of the appeal.—S. Proc., 1st October 1860.

Where the respondent files no answer and takes no objection to the original decree, the lower Court's decree cannot be altered to the prejudice of the appellant.—S. D. 1858, p. 18.

In an appeal preferred by one of the defendants, where the plaintiff merely appears as respondent, the decree of the lower Court cannot be reversed to the prejudice of a defendant not a party to the appeal.—Ib. p. 91.

The judgment of the lower Court as to costs cannot be reversed in favor of a party who has not appealed.—Ib. 1859, p. 268.

The sum decreed by the lower Court cannot be enhanced in appeal in favor of a party who has not objected to the amount so decreed.—Ib. p. 227.

APPEALS FROM ORDERS.

No appeal from an order will be received unless it be accompanied, at the time of presentation, by an authenticated copy of such order and of all other orders relating to the same matter.—S. Proc., 3rd October 1854, No. 133.

Where the order appealed from, and the petition of appeal, are of dates subsequent to the passing of the Code, it is not competent to the Court (except in the cases referred to in Section 11, Act XXIII of 1861) to hear the appeal in the presence of one of the parties, but all the forms of procedure required by Sections 344, 345, and 346 of the Code, must be gone through.—Ib. 1st October 1860.

Unless there be some express provision of the Code under which an appeal preferred by a party from the order of a lower Court can be received, such appeal must be rejected.—Ib. 13th July 1861.

No appeal lies from an order passed under Section 247 of the Code allowing the investigation of a claim to property attached in execution of a decree.

If an appeal be dismissed for default of prosecution, and the Appellate Court, on application made under Section 347 of the Code, refuse to re-admit the appeal, its order is final.—Ib. 17th January 1860.

No appeal, unless it be expressly provided, will, under Section 364 of the Code, lie against an order passed in execution of a decree, though such order be repugnant to the terms of the decree, or to some law or regulation in force at the time of its being passed; but the irregularity may be pointed out, and the officer cautioned against repeating it.—Ib. 17th August 1860.

If a lower Court exceed its jurisdiction when passing an order in execution, from which no appeal lies, the Appellate Court is competent to point out that the order cannot stand, but it cannot enter judicially into the merits of the case.—Ib. 24th April 1861.

An order passed by a District Moonsiff, directing execution of decree in favour of the heir of a deceased decree-holder, is not subject to appeal, though such heir may not have obtained a certificate.—Ib. 17th May 1861.

No special appeal lies from any order passed by a lower Appellate Court on appeal from an order of a Court of First Instance.—Ib. 12th April 1860.

A Civil Judge is precluded from taking any cognizance of an appeal from the order of a District Moonsiff rejecting, under Section 378 of the Code, an application to review his judgment; such order being final.—Ib. 21st January 1861.

An order passed under Section 378 of the Code being final, any proceedings held in the Appellate Court on the application of any of the parties are void *ab initio*, and the order of such Court cannot, therefore, be binding upon the lower Court.—Ib. 10th April 1861.

APPEALS TO THE QUEEN IN COUNCIL.

No petition of appeal to Her Majesty from a decree of the Sudder Court will be allowed, unless a sum of Rupees 4,000, as security for the eventual costs of the respondent, and Rupees 400 (to be afterwards increased if required) to meet the expense of preparing the record, be deposited within such time as the Court shall grant for the purpose.

Where there may be grounds for questioning the sufficiency of the ordinary amount of security, it will be open to the respondent to move that a higher amount be required; and the Registrar will determine what further sum, if any, the appellant is to deposit; provided that in no case shall a larger amount be demanded than Rupees 10,000.

Should the appellant fail to provide such additional security, or such further deposit as the Registrar may require, within six weeks from the date of receiving notice to deposit the same, the appeal will be disallowed.

No appeal to Her Majesty will be allowed unless the estimated saleable value of the property in dispute amount to Rupees 10,000 at least.—Ib. 26th November 1859.

If there be any doubt whether the value of the matter in dispute amounts to 10,000 rupees, the lower Court will be required to enquire into and report upon the subject.—Ib.

An appeal to Her Majesty is admissible where, at the date of the judgment, the sum recoverable under a decree of the Sudder Court, including interest, amounts to Rupees 10,000; but it is discretionary with the Sudder Court to allow or disallow an appeal in case where that amount can only be reached by the addition of interest accruing subsequent to the decree.—Judgment of the Privy Council, 15th June 1860.

In determining whether any appeal to Her Majesty has been presented within time, the same allowance will be made for delay on the part of the Court in furnishing copy of its judgment, or in disposing of any application for review, as is made in other cases.

In cases where the record may not have been transmitted to England, a compromise may be admitted by the Sudder Court.—Moore's Reports, Vol. I., p. 1.

Where the record in any appeal to Her Majesty may have been transmitted to England, any deed of compromise or agreement put in by the par-

ties is to be translated and forwarded to the Privy Council, in order that steps may be taken for striking the appeal off the file.

Where review of judgment may have been applied for, a copy of such application, as well as the order of the Court thereon, and of any new documents admitted and examined by the Court, may be transmitted to the Privy Council with the record of the case.

The amount of security to be taken from a party placed or left in possession of landed property, pending an appeal to the Queen in Council, is to be equal to the difference between the annual produce and the yearly revenue payable to Government; and such security is to be demanded at the beginning of each succeeding year, so long as the appeal may be pending.—S. Proc., 21st September 1826.

ATTACHMENT BEFORE JUDGMENT.

If money belonging to the defendant be in the custody of a public officer, and be attached by order of a Court to secure fulfilment of its decree, any assignment by the defendant of such money to another is void as against the claim of the plaintiff.—S. Dec. 1860, p. 158.

BATTA ESTABLISHMENT.

Judicial processes (when not specially entrusted to an officer of the Court) are to be executed either by Batta Ameens or by Batta Peons, according to the nature of each process.—S. Proc., 16th August 1860.

Where service is to be made upon the party's Pleader, or upon a public servant at the Court station, the process should be delivered to a messenger or other officer of the Court, and not to a Batta Peon.—Ib. 8th October 1860.

No process is to be delivered to an Ameen or Peon for execution until the prescribed charge has been paid.

The batta payable to Batta Peons is 4 annas per day, and 6 annas to Ameens. A Batta Peon will be required to travel 15 miles a day, and will be entitled to batta for the number of days occupied in proceeding to, and returning from, the place of residence of the person to be served, and for remaining one day at such place. When service is to be effected within 3 miles of the Court-house, a day's batta will alone be payable.—High Court Proc., 24th February 1864.

The Ameen should be directed to remain in charge of moveable property attached in execution under Section 233, only where it may be of a nature difficult to remove, or at a great distance from the Court; and in all such cases measures should be taken to effect the immediate sale of the property.—S. Proc., 8th December 1860.

Though an Ameen who has been deputed to attach property by actual seizure be detained in charge of such property, no additional batta is to be levied from the plaintiff.—Ib. 8th October 1860.

Where a warrant of arrest may be ordered by the Court to be executed by two peons in company, double batta will be charged for the same.—Ib. 16th August 1860.

If two or more such processes as are to be entrusted to Batta Peons have to be served on members of the same family, living together, and in the same suit or in connected suits, the full batta will be payable upon only one such process, and the rest will be served without further charge.—Ib.

If two or more of these processes have to be served on persons living in the same town or village, and in the same suits or in connected suits, the full batta will be payable upon one such process, and 2 annas upon each of other processes.—Ib. 16th August and 25th September 1860.

Where the names of several persons may be inserted in one process, single batta will be charged if they are members of the same family living together; otherwise full batta for one such person, and 2 annas for each of the rest.—Ib. 16th August 1860.

The batta payable by a defendant who has applied for discharge after arrest under Section 273 of the Code, and is left in the custody of the Batta Peon, will be at the rate of 4 annas per diem; a week's batta to be deposited in advance, and to be renewed at the same intervals until the inquiry is closed; failing which, the defendant is to be committed to prison.—Ib. 8th October 1860.

Warrants for the execution of decrees passed by Village Moonsiffs are to be executed by Batta Peons, and the charge is to be 2 annas per diem.—Ib. 25th January 1861.

The requisite batta for the service of notice of every appeal upon the respondent, be paid into the Court, the decree of which is appealed against, within seven days from the date on which the notice reaches such Court, and on the expiration of the above period, if the batta have not been deposited, the notice will be returned to the High Court, and the appeal struck off.—High Court Proc., 15th December 1865.

CAMP FOLLOWERS.

The term "Camp follower" applies only to such persons as are attached to a camp in some fixed capacity for the service of the camp, entitling them to a place in the camp, and not to adventitious and unrecognized followers.—S. Proc., 24th February 1858.

Sepoys' wives cannot be regarded as camp followers, so as to enjoy the civil privileges appertaining to persons of that class, unless they can produce a certificate granted by Section XXIII, Regulation VII of 1832.—Ib. 24th February 1859.

CAUSE OF ACTION.

Before registering any plaint, the Court is to determine, under Section 32 of the Code, whether the subject-matter of such plaint constitutes a cause of action.

If in similar cases it has been authoritatively ruled that no action lies, the Court will reject the plaint.

A suit to share in a pension cannot, under Regulation IV of 1831, be entertained unless the plaint be accompanied by an order of Government directing the party to seek redress in the Court.—S. Dec. 1860, p. 26.

A plaintiff was held to have been irregular in instituting three separate suits against the same co-parceners for his share of family property, though other persons were joined as defendants in each suit as being respectively in possession of portions of the family property.—Ib. p. 195.

If a theft be compounded, the agreement being, on the one side forbearing to prosecute, and on the other restitution of value of the property taken, a suit to compel the offender to restore the value of the stolen property cannot be entertained.

A suit for damages does not lie for an act which is merely hurtful to another's feelings.—S. D. 1859, p. 109.

A suit for damages does not lie for mere refusal to eat with another "in line."—Ib. p. 60.

A person cannot sue for a share of joint property independently of his co-sharers.—Ib. 1855, p. 35.

A person omitting to take legal steps for obtaining redress during the life-time or incumbency of a Collector, by whose official acts he considers himself to have been injured, has no remedy against his successor in office.—Ib. 1860, p. 65.

If the carrying of a flag in a procession be prohibited by a Magistrate on the ground of danger to the public peace, no suit will lie to determine the rights of the parties so long as such order is in force.—Ib. 1858, p. 214.

Arrears of rent can be recovered by summary process under Regulation XXVII of 1802, if claimed within the year in which they may fall due; but only by a regular suit if claimed after that period.—S. Proc., 10th April 1858. See also Act VIII of 1865.

A party aggrieved by the judgment or order of a Collector under Sections V and VI, Regulation IX of 1822, may either institute a regular suit on the full stamp against him for damages, or present an appeal to the Civil Judge on the stamp required for petitions; and in either case the whole merits of such judgment or order will come under the Court's consideration.—Ib. 20th October 1853.

Act XVIII of 1850 does not prohibit the entertainment of a suit against

a Collector for undue exactions of revenue or loss sustained by parties by his official acts.—Ib. 25th January 1851.

A suit may be brought to recover a fine imposed by a Magistrate acting without jurisdiction.—S. D. 1857, p. 154.

In a suit against a Magistrate respecting an act done in his official capacity, the Court must decide whether the act was legal or justifiable, and will not be bound by any opinion or order recorded by the defendant's official superiors.—S. Proc., 2nd September 1830.

The Manager of a Pagoda may maintain a suit to eject a party occupying land belonging to such Pagoda.—S. D. 1858, p. 81.

Where a servant of a Pagoda is dismissed without sufficient cause, he may bring a suit against the Managers if the office held by such servant be hereditary.—Ib. 1855, p. 78.

A suit may be brought to set aside a decree if the plaintiff's interests are affected thereby, though he may not have been a party to the suit in which such decree was passed.—Ib. 1859, p. 26.

A party inconvenienced by the obstruction of a public way can maintain a suit against the person causing such obstruction.—Ib. 1858, p. 155.

Any party interested in the appropriation of land to a public purpose is at liberty to sue to have the said purpose carried out, without being joined by others similarly interested in the matter.—Ib. 1856, p. 68.

A Collector's award of produce forms no bar to the institution of a suit wherein the title to the land is put in issue.—Ib. p. 69.

A suit is not irregular in consequence of its being brought by three out of four partners, if the fourth be joined as a defendant.—Ib. 1857, p. 121.

Losses sustained in the commission of criminal offences are recoverable from the offenders by a civil suit.—S. Letter, 9th September 1836.

The sentence of a Criminal Court on a charge of abduction of the plaintiff's wife, does not bar the institution of a suit against the defendant for any pecuniary loss sustained by the husband in consequence of the act so punished.

If a riot result in the plunder of property and destruction of houses, the parties injured may bring a suit for damages against the rioters.—1. S. Sel. D., p. 192.

Parties having a reversionary interest in property are entitled to bring a suit for a declaration of their rights.—S. D. 1860, p. 130.

If a suit be compromised, any party who did not join in such compromise may bring a fresh suit respecting the same cause of action.—Ib. p. 104.

COLLECTOR.

Collectors should keep a file of all suits instituted before them under Regulation V of 1822, numbering them as in the Civil Courts, according to the year in which they may be instituted.—S. Proc., 21st February 1853. See also Act VIII of 1865.

A Collector cannot decide a suit involving the proprietary right to lands, his power under Regulation V of 1822 being confined to trying summarily the question of temporary cultivation or occupancy.—Ib. 13th March 1848.

A Collector acting under Regulation V of 1822 cannot give judgment in cases where questions of Hindu law, right of succession, and construction of wills, are necessarily brought under consideration.—Ib. 11th December 1843.

The prohibition in Clause 2, Section II, Regulation V of 1822, against the levy of costs or damages till after the thirty days allowed for appealing from the decision, has reference only to cases of forcible dispossession.—Ib. 10th December 1838.

Except as regards costs, execution of the decision of a Collector under Clause 4, Section IV, Regulation V of 1822 cannot be stayed pending appeal, because the power of a Collector to order the sale of property attached for arrears of rent is positive and unrestricted.—Ib.

Except as regards costs and damages, execution of the decision of a Collector under Section XI, Regulation V of 1822, cannot be stayed pending appeal, because the decision does not convey any proprietary title, but merely determines the right of occupancy or possession.—Ib.

In districts where there is a Subordinate Judge, appeals from decisions of Collector under Clause 1, Section XVI, Regulation V of 1822, lie to the Subordinate Court, and not to the Zillah Judge.—Ib. 4th March 1844.

Appeals from the summary decisions of Collectors under Regulation V of 1822 are to be registered as Regular Appeals, the Collector's decision being treated as a decree in an original suit.—Ib. 10th March 1853.

A Collector cannot be made a respondent in an appeal against one of his own judicial decisions under Regulation V of 1822.—Ib. 5th November 1839.

If a Collector have occasion to address the Court relative to any matter connected with a suit instituted against him for acts done in his official capacity, he should move the Court through the Government Vakeel.—S. Letter, 21st December 1835.

The omission or refusal of a Collector to obey the order or decree of a Court will not, under Section XXV, Regulation XXVII of 1802, render him liable to a fine, unless it take place in connection with a suit instituted against such Collector in a private capacity.—Ib. 20th February 1824.

COMMISSION.

The scale of remuneration for Commissioners under Section 182 of the Code is left to the Court's discretion, and will depend upon the circumstances of each case, such as the nature of the accounts, whether simple or complicated, the time required for their investigation, and the qualifications of the Commissioner, a higher remuneration being necessarily payable if a professional person be employed.—Ib. 16th April 1860.

COPIES.

The parties to any civil or criminal proceeding will be entitled to obtain, on application, copies of any judgment, decree, order, sentence, document, deposition, or other record connected therewith, not being in its nature extra-judicial.—Ib. 21st March 1860.

No copies of extra-judicial correspondence, or of the minutes of the Judges, will, under any circumstances, be given, whether the party applying for the same be affected thereby or not.

Persons requiring copies of records connected with any civil suit or proceeding, to which they were no parties, may move the Court by petition to furnish them with the same.—Ib.

If it appear that the applicant is affected by the record in question, or that he requires it for use in any judicial proceeding, the copy may be furnished accordingly.—Ib.

A party is entitled to authenticated copies of documents connected with any proceedings to which he may have been a party, whether they may be required for production in the higher Court or not.—Ib. 28th April 1860.

A party cannot be refused copy of any order on the ground that he has not discharged a fine imposed upon him by the Court.—Ib. 27th September 1859.

Authenticated copies will be furnished on stamps only, except in the case of criminal records, and decrees or orders of District Moonsiffs in suits under fifty rupees.—Ib. 21st March 1860.

Copies will be furnished on plain paper without authentication, if required for the use of the party's Pleader, or for any other private purpose.—Ib. 23rd October 1860.

The copies are to be so written as to contain about two hundred and forty words in a page, and to be charged for according to that average.—Ib. 21st March 1860.

The charge for unauthenticated copies will be one anna and a half for every page if in English, and one anna if in the vernacular; and for authenticated copies, two annas if in English, and one anna and a half if in the vernacular.—Ib.

No suitor or Pleader will be allowed to make copies of records, whether personally or by his Gomastah or private agent.

All copies are to be made under the immediate superintendence of the Serishtadar, or other head Ministerial Officer, by authorized copyists, who are to be selected from among the passed candidates, where such may offer themselves.—Ib. •

No suitor or Pleader will be allowed to hold any communication with the copyists.—Ib.

Copies of records applied for by parties are not to be made by the regular establishment, but by the copyists only, except in the case of criminal sentences, which are to be made in the office without charge.—Ib.

These rules will not be applicable to copies required by the Collector in a suit to which the Government is a party, if the Collector be prepared to have such copies made in Court by one of his own writers or Gomastahs.—Ib.

No other particulars are to be appended to authenticated copies of decrees and orders appealable to the Sudder Court, than (1) date on which the copy was applied for, (2) date on which any additional stamps may have been called for, (3) date on which such additional stamps may have been furnished, (4) date on which any petition for review may have been presented, (5) date on which the order on such petition may have been passed, (6) date on which the copy was ready for delivery.—Ib. 25th January 1861.

Whenever application may be made for an authenticated copy of any decree passed on regular appeal in any suit of the nature of those cognizable by Courts of Small Causes, and wherein the claim may not exceed Rupees 500, a note to the following effect is to be appended to such copy: "Under Section I, Act XLIII of 1860, no special appeal lies from this decree."—Ib. 3rd November 1860.

In all cases in which Pleaders are retained, authenticated copies of orders passed are to be delivered to them, on their application, and not to their clients.

Where a party is unable to obtain a copy of some record in another office essential to his case, the Court should, on the motion of such party, furnish him with an order stating such record to be requisite, and, failing this means, should summon the proper officer to produce such record, (unless the same be sent for under the provisions of Section 138 of the Code.)—Ib. 7th March 1842.

Where a special appeal is rejected, the judgments and decrees put in with the application may be returned to the party, without requiring any copies to be left in their place.

A District Moonsiff is competent to grant copies of exhibits if application be made for the same before the originals have been sent for deposit in the Civil Court.—Ib. 10th April 1861.

Any party to a suit before a District Moonsiff may obtain certified copies

of the decree and judgment on providing the paper and regulated copyist's hire.—Ib. 17th January 1860.

Where a copy of a District Moonsiff's decree may by law be made on unstamped paper, any authenticated copy, granted either by the District Moonsiff or by the Civil Judge, must be made on such paper.—Ib. 25th February 1860.

If the value of the claim amounts to fifty rupees or more, a certified copy under Article 2, Schedule B, Act XXXVI of 1860, can only be granted on stamped paper.

COSTS.

In apportioning costs, the Court should be guided by the circumstances of the *suit*, not by those of the parties; and no party should be adjudged to pay costs merely because he is richer and better able to bear them than any other party.—S. D. No. 61 of 1844.

Money paid by parties to private agents, and expenses incurred in preparing their pleadings, cannot be charged as costs in the suit.—S. Proc., 12th April 1836 and 27th November 1837.

Costs may rightly be adjudged against the parties, exclusively, who caused the litigation.—S. D. No. 11 of 1836.

A party who has been irregularly sued ought not to be adjudged to bear any costs.—Ib. 1851, p. 240.

The whole costs of the suit were adjudged to be paid by the plaintiff, where he had exaggerated the amount of the mortgage debt, and thus necessitated his claim being contested, though the mortgage was admitted.—Ib. 1855, p. 97.

The defendants should not be saddled with the costs of a suit where the plaintiff's claim is dismissed.—Ib. 1865, p. 73.

Costs should generally be charged to the parties in proportion to the sums allowed or disallowed.—Ib. 1850, p. 61; and 1857, p. 217.

As a general rule, when a decree is given for arrears of rent due to proprietors or farmers, the Courts should award the full costs incurred.—Ib. 1857, p. 86.

If a suit be privately adjusted, the Pleadings' fees are to be apportioned in accordance with the agreement of the parties, if any; otherwise they are to be calculated in the same manner as in suits remanded.—S. Proc., 3rd March 1860.

Where each party is adjudged to bear his own costs, no statement of costs need be appended to the decree.

Where any suit is remanded, a statement of the costs incurred in the Appellate Court is to be appended to its order, that the same may be charged to the losing party in the revised decree of the lower Court.

Every party to a suit may retain one or more Pleadings, and several parties on the same side may retain one or more Pleadings in common,

but the losing party will under no circumstances be charged with the fees of more than one Pleader for each party on the other side.—Ib. 8th April 1830.

Where parties on the same side retain each a separate Pleader, the other party, if he loses, will be charged with the fees of each of such Pleaders, if the interests of the parties retaining them were distinct, and with the fees of one only if their interests were identical.—Ib.

Pleaders' fees are to be calculated upon the same sum upon which the stamp used for the memorandum of appeal was calculated.—Ib. 5th November 1829.

Difficulty experienced in estimating the rate of fees will be no ground for disallowing fees altogether.—S. D. 1856,*p. 93.

The Courts have no authority summarily to interfere in recovering for a Pleader the amount due to him by his client under a private agreement; this should form the subject of a regular suit.—S. Proc., 18th November 1849.

If a pauper suit be privately adjusted, the plaintiff's Pleader should not be referred to a regular suit to recover his fees, but the Court should award him reasonable compensation for his labour, and recover it by the usual process.—S. D. 1852, p. 76.

If a suit be remanded, the Pleader's fees are to be calculated at one-fourth of the fees in a regular suit decided on the merits.—S. Proc., 3rd March 1860.

DEFECT OF PARTIES.

Where a person, who ought to have been joined as a defendant, has not been sued, judgment should not on that account be given against the plaintiff, but such person should be made a party by the Court.—S. D. 1858, p. 45.

The Courts should not call upon a plaintiff to include as defendants other claimants to the property sued for, the bringing in of fresh parties being entirely an act of the Court.—S. Proc., 27th November 1860.

The Code does not admit of any supplemental plaint. It will be sufficient for the Court, where there is a defect of parties, to state in its order (under Section 73 of the Code), the name and description of the person to be made a party, and to direct that a notice be issued to him accordingly.—Ib. 17th August 1860.

Section 73 requires no more than that those persons should be joined as defendants whose claims are necessary to be taken into consideration before deciding on the plaintiff's title. It is the *latter only* which will form the subject of the decree.—Ib. 27th November 1860.

Where there is a defect of parties, it is competent to the Appellate Court, under Section 354 of the Code, to direct that any person having an interest in the subject-matter of the suit, inseparable from that of either of the par-

ties, be made a plaintiff or defendant; and to frame an issue accordingly and refer the same for trial by the lower Court.—Ib. 19th March 1860.

Where the Appellate Court, upon discovery of a defect of parties, purposes framing an issue and referring it to the lower Court for trial, it will be sufficient, without the use of stamps, for the Court to note down at the hearing the necessary particulars to enable it to frame the issue; and the lower Court will, under Section 73 of the Code, issue notice to the person directed to be made a party.—Ib. 17th August 1861.

No steps will be taken by the Court to bring in the representative of a deceased plaintiff or defendant, except on the application of the parties; and if no such application be made within three months, the Court may pass an order that the suit shall abate.—Ib. 24th August 1861.

DISTRICT MOONSIFFS.

District Moonsiffs are competent, under Section 5 of the Code, to receive and try suits for sums of money or other personal property under ten rupees in value.—Ib. 16th April 1860.

A District Moonsiff is competent to try a suit instituted against the Collector, arising out of an act done in his official capacity.—Ib.

District Moonsiffs are competent to receive and try pauper suits under Section 297 of the Code, without reference by the Civil Judge, where the value of the matter in dispute is within their jurisdiction.—Ib. 19th March 1860.

Suits brought for the dismissal of Curnums are not excepted from the jurisdiction of District Moonsiffs.—S. D. 1854, p. 108.

ESTATES.

Under Act VIII of 1855, the Civil Judge is the proper officer to take charge of the effects of European British subjects dying in the provinces.—S. Proc., 18th February 1858.

On the death of a European British subject, not being a Military Officer or Soldier, the Civil Judge is immediately to take charge of his effects unless there be a will and an executor willing to act.—Ib. 12th May 1834.

The Civil Judge is without delay to have a correct inventory made of the whole of the effects, bringing upon the Court's accounts any cash belonging to the estate, and to forward to the Administrator General a copy of such inventory together with a copy of the will, if any, and any information which the Civil Judge may have obtained as to the surviving relations of the deceased.—Ib.

If plate, jewels, or other valuables be found among the deceased's effects, they are forthwith to be sent for safe custody to the Collector's treasury, and there kept till the day fixed for their sale by public auction or delivery to the parties entitled thereto.—Ib. and 20th May 1853.

In the event of the effects being sold at public auction, no higher commission than 5 per cent. is to be allowed to the auctioneer, and such commission is not to be paid till correct accounts have been rendered.—Ib. 12th May 1834.

In cases where the deceased may leave a will, the Civil Judge is to forward a copy of the will and of the inventory of the effects to the executors, if residing within the Madras Presidency.—Ib.

If the Administrator General should decline to apply for letters of administration in respect of the estate of any European British subject, the Civil Judge must proceed under the provisions of Section XVI, Regulation III of 1802.—S. L. 18th May 1855.

Where a European British subject, not being a Military person, dies at a distance from the station of the Civil Judge, his effects are to be secured by a European Revenue Officer, if present, otherwise by the District Moon-siff or Sub-Magistrate, or by the Commanding Officer at Military stations where there is no Civil Officer present.—Govt. Notification, 1838.

On the death of a Military Officer or Soldier, or any other Military person, at a station where there is no Military Officer, the Civil Judge is to secure the deceased's effects and forward them to the nearest Military authority, reporting his proceedings without delay to the Military Secretary to Government; but Civil Judges are not otherwise to interfere with the estates of such persons.—Ib. 19th March 1861.

Civil Judges, on taking charge of the estates of European Pensioners, are to forward to the Adjutant General, for transmission to the Secretary of State for India, any will which may have been left by them.—S. Proc., 22nd January 1845.

Whenever a Civil Judge may have occasion to communicate to the Administrator General the death of a European British subject leaving assets below Rupees 500, he should at the same time furnish information as to the names of the claimants and the value of the property left.—Ib. 30th August 1855.

The Administrator General is not competent to call upon a Zillah Judge, who has fulfilled the duty imposed upon him by Section LIV, Act VIII of 1855, to act further, and ministerially, in the collection of sums due to the estate of a deceased British subject.—Ib. 13th February 1858.

The effects of Europeans other than British subjects are to be dealt with according to the provisions of Section XVI, Regulation III of 1802.—Ib. 12th May 1834.

If an Eurasian die intestate, and his heir be unwilling to take charge of the estate, the Civil Judge should proceed under Clauses 5 and 7, Section XVI, Regulation III of 1802.—Ib. 8th August 1860.

Where a widow declines to administer the estate of her deceased husband, and a party applies to have the property sold in execution of a decree against the deceased, such property may be brought to sale, and no report to Government will be necessary.—S. Letter, 26th February 1848.

An executor, after having actually entered upon his duties and taken possession of all the real and personal property of the deceased, cannot be relieved from his office; nor can the Courts interfere, except on a regular complaint against him for breach of trust or other offence.—S. Proc., 15th January 1847.

The duty of nominating guardians to disqualified heirs, under Section XX, Regulation V of 1804, devolves upon the Civil Judge and not upon the Subordinate Judge.—Ib. 10th February 1858.

Section XX, Regulation V of 1804 allows of a guardian being appointed, where necessary, for the protection of minors who are joint heirs with others, and does not restrict the measure to the case of such as may be sole heirs.—Ib. 2nd March 1858.

If a Collector decline recommending the Court of Wards to take charge of the estate of a minor paying revenue to the amount of Rupees 1,000 direct to Government, the Civil Judge may appoint a manager to the estate and take steps for the guardianship and education of the minor.—Ib. 10th April 1861.

If the estate of any disqualified proprietor be not for any reason taken charge of by the Court of Wards, the Civil Court may, under Section III, Regulation X of 1831, take the estate under its management.—Ib. 30th April 1853.

By the expression "set forth his title," in Section III, Act XXVII of 1860, is meant nothing more than that the party applying for a certificate should state the facts on which he rests his claim to represent the deceased.—Ib. 4th September 1860.

The expression does not apply to the heir-at-law only: parties claiming under a will may also obtain certificates, where a testamentary disposition is valid in law.—Ib.

Certificates cannot be granted to creditors, as they are not within the line of heirs by Hindu law, and there is no enactment authorizing them to take out Letters of Administration.—Ib.

Except in a single instance provided for in Section II, judgment cannot be given in any suit under Act XXVII of 1860, against a debtor to the estate of a deceased person, without the production by the plaintiff of the prescribed certificate.—Ib. 16th October 1860.

Should the plaintiff fail to obtain a certificate within a specified time to be fixed for the purpose, the Court should proceed, under Section 148 of the Code, to a decision of the suit on the record, which must necessarily be by giving judgment for the defendant.—Ib.

EXECUTION OF DECREES.

All decrees, whether passed before or after the Code came into operation, must be executed under the provisions of the Code.—Ib. 13th July 1860.

Where two plaintiffs sue for separate shares of the same property, and

* See also Act IX of 1861.

obtain a decree accordingly, each may, under Section 207 of the Code, apply separately for execution of the decree in respect of his own share.

If a decree-holder die, the decree is transferred by operation of law to his legal representative; but it cannot be executed in favor of such representative, until he has obtained a certificate from the District Court under Act XXVII of 1860.—Ib. 17th May 1861.

If the person against whom it is sought to execute the decree plead that he never was defendant in the suit, the Court must enquire into the plea after notice to the decree-holder, and pass such order as may appear just and proper. If the plea be substantiated, the judgment cannot be enforced against him.—Ib. 17th August 1860.

Judgment-debtors are at liberty to pay into Court, at any time, either before or after execution is applied for, the sums decreed against them.

A Civil Judge has no power to execute or take any steps towards the execution of any decree, which, under the provisions of Section 362 of the Code, ought to be executed by a District Moonsiff or other subordinate Judicial officer, notwithstanding that such officer maybe absent and the property decreed may be in course of alienation.—Ib. 1st March 1861.

It is not in the province of the Courts to assist a suitor in the transaction of his business in the Collector's office: no correspondence with the Revenue Authorities, therefore, will be necessary respecting the issue of puttahs to persons to whom lands may have been decreed.—Ib. 17th August 1860.

Salt-pans do not come under the designation of estates paying revenue to Government, referred to in Section 225 of the Code; and decrees for the separate possession of shares of salt-pans should, therefore, be executed by the Courts, and not by the Collector of the District.—Ib. 9th April 1861.

The boundaries, where specified in the decree, and not the exact quantity by subsequent measurement, indicate the identity of the lands, of which possession is to be given to the decree-holder.

Where a decree contains merely a declaration of right in the plaintiff, subject to that of any superior claimant who may appear, positive possession cannot be given to the plaintiff under the decree on the death of the party in possession.—S. Dec. 1860, p. 130.

If the decree direct the defendant to fill up a well dug on premises adjudged to the plaintiff, and he refuse to do so, the Court executing the decree may cause the well to be filled up, and recover from the defendant the expenses incurred.—S. Letter, 5th January 1837.

Where execution of a decree for immovable property is resisted or obstructed, it is not incumbent on the Court, upon a bare claim to property, to register the case as a suit, under Section 229 of the Code, if it be not satisfied that the claim is a *bona fide* one.

None of the *parties* to the suit can claim the investigation provided by Section 230 of the Act.

If it be found, on proceeding to enforce a decree, that no such land exists as that described in the plaint, the parties must be referred to a fresh suit.—S. Proc., 25th January 1848.

Where a decree required the defendant to pay a monthly sum out of his salary as a peon to the plaintiff during his minority, and to give up his situation to the plaintiff on his becoming of age, agreeably to stipulations contained in a bond, it was ruled that the decree was altogether illegal and could not be executed.—Ib. 24th October 1859.

A decree may be executed against a defendant's sureties to the extent to which they have rendered themselves liable, without any suit being instituted against them for the purpose.—Ib. 18th October 1841.

If execution be taken out, and the sum decreed be not immediately paid, the judgment-creditor may at once proceed against the defendant's surety.—Ib. 12th June 1843.

Where a separate maintenance is decreed, and the defendant habitually neglects to pay it, it is competent to the Court to demand security from the defendant, or attach his property, to ensure the future payments being duly made.—Ib. 1st March 1861.

The minority of the parties entitled to an estate out of which maintenance has been decreed, is no bar to the execution of the decree.—Ib. 22nd March 1858.

A sepoy's pay is not liable to attachment, under Section 237 of the Code, in execution of a decree for maintenance.—Ib. 1st March 1861.

The money allowance paid to a Polygar, in lieu of land resumed by the Government, cannot be attached in execution of a decree.—Ib. 26th August 1861.

Movable property found in the defendant's possession, and attached by actual seizure under Section 233 of the Code, cannot be left in the charge of a surety. But where such property may be at a distance from the Court and of a description difficult to remove, the Ameen deputed to attach it may keep the same in his custody upon the spot, and on the receipt of his report the Court may at once proceed under Section 242 to order the sale of the property so attached.—Ib. 19th March 1860.

Where movable property has to be attached in execution, and it is of a perishable nature, the usual process for attachment and sale should be issued simultaneously under Section 250 of the Code.—Ib. 4th December 1860.

If property be attached by order of a District Moonsiff, any claim or objection which the Collector may have to make in respect of such property may be preferred through one of the Pleaders practising in the Court of such District Moonsiff.—Ib. 16th April 1860.

The object of the concluding clause of Section 246 is not to keep the attachment open for the claimant, but to limit the period within which he may bring a suit to establish his right to the property attached. The order

disallowing the claim not being subject to appeal, the Court may, in its discretion, proceed to sell the property.—Ib. 19th March 1860.

Until the Government vests Collectors generally, or any Collector particularly, with the power of selling revenue-paying land in execution of decrees, the Courts are, under Section 248 of the Code, to effect such sales by means of their own officers.

No application for execution of a decree by attachment of any estate paying revenue to Government can be received, unless it be accompanied by an authenticated extract from the Revenue Register.

It is an authenticated extract of the Register, as it exists, which is alone required under Section 213 of the Code, and it is not competent to the Revenue authorities to refuse to grant the same, notwithstanding that such Register may not indicate the present owner of the land.—Ib. 15th October 1860.

There is no provision in the Code under which a claim preferred to property attached by one Court can be called up by the Civil Judge and referred to another Court for investigation.—Ib. 1st September 1860.

Decrees of the Presidency Courts of Small Causes cannot be executed by attachment of real property, but only by imprisonment of the defendant, or distress and sale of his goods and chattels.*

Though the pay of a sepoy cannot be attached in execution of a decree, the decree-holder may proceed against his person and property.—Ib. 25th February 1858.

The maintenance decreed to a widow suing in *forma pauperis*, cannot be attached for the Stamp duty due to Government on that portion of her claim which has been disallowed, but money awarded as the value of jewels may be so attached.—Ib. 9th March 1837.

In all cases where land attached in execution of a decree is ordered to be sold, notice of such sale is to be sent to the Collector of the District.—Ib. 15th February 1847.

In disposing of objections raised by the Revenue authorities to the sale of lands in execution of decrees, the Courts are to be guided, not by the peculiar usages of the district, but by the general regulations.—Ib. 8th August 1848.

If a suit be instituted to annul a sale of land in satisfaction of a decree of Court, the proceeds of the sale, if not paid over when the suit is instituted, are to be held in deposit until such suit is decided.—Ib. 11th October 1827.

A purchaser at a public sale of land in execution of a decree acquires no rights but those possessed at the time of the sale by the judgment-debtor.—2nd S. Sel. Dec., p. 74.

If the decree-holder be declared to be the purchaser, at a sale in execution of a decree, the sum which he is entitled to recover may be looked

upon in the light of the prescribed deposit and purchase-money, so far as it is sufficient for the purpose.

The Nazir cannot be allowed any commission upon property sold by order of Court.—S. Proc., 29th February 1836.

Money realized by the sale of property is not to remain in the Nazir's custody, but to be remitted to the Revenue Treasury, if for any reason it cannot be at once paid over to the party entitled thereto.—Ib. 8th February 1845.

If execution has been completed and possession given to the decree-holder, any subsequent petition by a third person laying claim to the property is too late, and no appeal will lie against the order rejecting it, but the person may institute a regular suit to establish his right.

If a party who has taken the benefit of the Insolvent Act plead that he is not liable to arrest in execution of a decree, he must produce a certificate from the Insolvent Court —Ib. 29th April 1860.

If a debtor be imprisoned on account of several decrees obtained against him by the same creditor, subsistence money need not be deposited in each case.

Where several plaintiffs may apply for the imprisonment of a judgment-debtor, each plaintiff must provide the regulated monthly allowance for the debtor's subsistence.—Ib. 24th March 1812.

The subsistence money of a defendant committed to prison must be paid by the judgment-creditor, notwithstanding that the defendant may be drawing a pension.—Ib. 9th May 1844.

The application of a party for his discharge, under Section 280 of the Code, should be prepared to the address of the Court under whose orders the person may be in confinement in execution of the decree; and should be received and forwarded if necessary to such Court, post-free, by the Judge in charge of the Jail.—Ib. 25th February 1860.

Decrees of the Court can be executed within the jurisdiction of the Supreme Court only under the provisions of Act XXXIII of 1852; and the rules laid down in Act XXIII of 1840 should be observed in such cases.—Ib. 14th February 1861.

The Courts are only bound to execute decrees of the Mysore authorities if application is made to them under the conditions required by Section 284 et seq. of the Code.—Ib. 24th November 1860.

The application under Section 288 of the Code must be made by the decree-holder, either in person or by a Pleader, to the Court to which the copy of the decree and certificate may have been transmitted for execution.—Ib. 16th April 1860.

Where an application is made to a Civil Court under Section 288 of the Code for execution of a decree passed by a Moonsiff of another District, the same rule will apply as to whether the application shall be on plain or stamped paper, as if it were presented to the Moonsiff.—Ib.

A Collector has no power to fine the Government Pleader, who stands in regard to the Collector precisely in the same relation that any other Pleader does to his client; and any penalty for negligence or misconduct can only be imposed by the Civil Judge.—S. L., 5th December 1822.

If a Pleader employed by the plaintiff in a suit against the Government be appointed Government Pleader, his services may nevertheless be retained by such plaintiff; but if they be relinquished, he may appear for the Government.—S. Proc., 2nd June 1826.

An appeal cannot be preferred by the Government Pleader in the name of a Public Officer, without his express authority.—S. Dec. 1859, p. 203.

HEARING.

No matters are to be admitted to a hearing but those of a strictly judicial nature.

The preliminary examination of the parties or their Pleaders at the first hearing, for the purpose of ascertaining upon what matters the parties are at issue, is to be entirely oral, and conducted by the Judge himself, without permitting any cross-examination or argument of the parties.

A Pleader of the Sudder Court pleading in a lower Court is not entitled, without express permission, to address the Court in English, if he be acquainted with the language of the district and the opposing Pleader does not understand English.—S. Proc., 21st April 1858.

Barristers and Attorneys, when pleading in any lower Court in which the language of the Judge is English, may address the Court in that language, the Judge making arrangements for the interpretation, if necessary, of such address to the Pleader on the other side.—Ib. 22nd July 1858.

Pleaders are not to be unreasonably checked in the freedom of language they may employ on behalf of their clients.—Ib. 4th November 1819.

Where a defendant appears in person or by Pleader, the fact that the defendant is not prepared to put in a written statement does not warrant the trial of a suit *ex-parte*.—II. H. C. R., p. 311.

INAM.

In the case of complaints relating to Inams, or grants by the ruling power, the Judge is to ascertain, by reference to the enactments of the legislature and the rulings of the Sudder Court, whether the complaint is admissible or not, before he brings it upon his register of suits.

A suit to recover possession of Inam land cannot be entertained by the Courts unless the plaintiff produce authority from the Government to institute the same.—S. Dec. 1859, p. 257.

A suit for participation in the profits of Manyam land cannot be entertained by the Courts unless the plaintiff produce authority from the Government to institute the same.—Ib. 1859, p. 46.

The prohibition against the interference of the Courts with claims to Inam lands extends to the produce of such lands, except where the Inamdar

may have divested himself of his right to the produce.—S. Proc., 20th October 1858.

Claims to grants conferred by the British or former Native Governments, for good services performed, or as charitable allowances, are, under Regulation IV of 1831, not cognizable by the Courts.—Ib. 12th July 1855.

Claims relating to grants attached to offices as wages for the performance of public services, are, under Regulation VI of 1831, not cognizable by the Courts.—Ib.

If land be attached by a Court, and it be declared by the Revenue Authorities to be held on Inam or rent-free tenure, the attachment is to be, without further enquiry, removed.—Ib. 30th April 1853.

If it be shown that land, formerly held on Inam tenure, has been enfranchised in either of the ways referred to in Section XXIX of the Inam Rules, there is nothing in the Regulations relating to Inams to prevent the Courts from receiving any suit respecting such land.—Ib. 14th August 1861.

Where the matter in dispute is not title to Inam land, but the right to certain produce raised by permission of the Inamdar, the suit is cognizable by the Courts.—S. Dec. 1858, p. 268.

Suits for the recovery of rent due on Inam land, where the right to the Inam is not in dispute, are admissible by the Courts, without the previous permission of Government.—Ib. 26th June 1856.

Suits relating to grants made for pious or beneficial purposes are cognizable by the Courts under Section XIV, Regulation VII of 1817.—Ib. 12th July 1855.

An Agraharamdar, holding his village on a favorable quit-rent, may institute a suit against the Collector for recovery of sums unduly exacted without obtaining the previous permission of the Government.—Ib. 27th October 1839.

Claims for the rent of Inam land are cognizable by the Courts, but not those for an allowance payable from the collections made from such lands.—Ib. 1856, p. 128.

The mortgage of Inam land not being illegal, an Inamdar may maintain a suit to redeem such land from mortgage.—S. Proc., 22nd October 1859.

Suits for recovery of land granted by a Jaghiredar are cognizable by the Courts.—S. Dec. 1850, p. 65.

ISSUE.

A notice will be affixed in the Court House on receipt of the finding of the lower Court upon any issue referred to it for trial; and any memorandum of objections against such finding must be put in within fifteen days from the date of such notice.

JUDGMENT AND DECREE.

If, after a Judge has left the Court, it be found that in any suit brought

to a final hearing, no written judgment has been placed on record by him, his successor must hear and decide the suit, notwithstanding that such Judge may have pronounced judgment in the case and made a brief note of his decision.—S. Proc., 11th June 1861.

Judgments written by a Civil Judge but not pronounced in open Court cannot, in the event of his removal before pronouncing the same, be published by his successor, but the cases must be re-investigated.—Ib. 7th August 1849.

If a Judge die and any of his uncopied judgments be found imperfect or illegible, fresh judgments are to be pronounced by his successor in office.—S. L., 5th October 1835.

If decrees are left unsigned by a Judge who has died or quitted the station, after pronouncing judgment in open Court and preparing written judgments, such decrees may be signed for him by his successor.—Ib. 5th October 1835.

The judgment is to be divided into paragraphs, and the paragraphs numbered.—S. Proc., 29th April 1850.

The judgment is to recite the claim and defence, the nature of the exhibits, the oral evidence adduced, and the several particulars required by Sections 185, 186, and 187 or 359 of the Code; but is not to give any *details* of the costs, nor to be sealed.—Ib. 3rd December 1860.

The parties in appeals are not to be referred to in the judgment as Appellants or Respondents, but as Plaintiffs or Defendants.—Ib. 5th December 1860.

Every judgment should be expressed in clear and precise language, and describe in distinct and positive terms the nature of the decision.—S. Dec. 1851, p. 165.

Where cross appeals are preferred from the same decree, one judgment is to be given upon both appeals, embracing the several matters put in issue in each of the appeals respectively.—S. Proc., 18th January 1858.

Revised judgments, in cases remanded, are to be complete in themselves, and not to require reference to the first judgment to elucidate their meaning.—Ib. 2nd February 1853.

Under the terms of Section 359 of the Code, every native Principal Sudder Ameen, who is able to write intelligibly in English, is bound to write all his appeal judgments in that language.—Ib. 16th January 1861.

Under Section 184, any native Judge, sufficiently conversant with English to be able to write a clear and intelligible decision in that language, may write his judgments in English.—Ib.

Suits in which Europeans are parties are to be decided according to justice, and equity, and good conscience, and not necessarily according to English law.—Ib. 17th November 1837.

A judgment must dispose off the plaintiff's claim according to his statements in the plaint.—S. Dec. 1858, p. 22.

No question can be raised by the Court as to the plaintiff's title if it be not disputed by the defendant.—Ib. 1853, p. 127.

Judgment cannot be given against a plaintiff for not producing documents in his possession, unless they are material to the issue, and notice to produce has been served upon him.—Ib. 1859, p. 3.

Where maintenance is awarded, the grounds (arising out of the conduct of the defendant) upon which the award is made, are to be clearly specified.—Ib. 1851, p. 209.

If the defendant urge, during the progress of the suit, that he has satisfied the plaintiff's claim, no evidence can be taken on the point, but judgment may be given in his favor to the extent of any admission made by the plaintiff.—Ib. 1860, p. 135.

No part of property in the possession of a defendant can be adjudged to parties not before the Court, though they may appear to have a right to the same.—Ib. 1851, p. 141.

It is contrary to judicial practice and precedent for a Court in its judgment to declare an alternative for the option of the parties in a suit, as, for instance, to adjudge that maintenance be paid by the defendant, or the family property divided.—Ib. p. 111.

It is contrary to the practice of the Courts to discuss a point, other than a point of law, not raised in the pleadings.—Ib. p. 125.

The judgments and decrees of the Courts are to be distinct documents.—S. Proc., 3rd December 1860.

The decree is to state the matters required by Section 189 or 360, without adverting to any of the reasons or considerations detailed in the judgment, and is to contain a full statement of costs.—Ib.

No separate entry is to be made of the date on which the decree may be sealed and signed; the only date appearing in the decree is to be that on which judgment was pronounced, which ordinarily will be the day on which the suit is finally heard.—Ib.

Every decree should be drawn up within five days from the date of pronouncing judgment, and the fair copy and translation of the judgment required for record in Court should also be completed within the same time.—Ib. 6th September 1860.

If property be attached before judgment, and application be afterwards made for the sale of such property in execution of a decree, measures can only be taken to set aside such decree by a regular suit, but application may be made by petition under Section 90 of the Code to set aside the mere order for execution.

JURISDICTION.

Every plaint, on its presentation, should be examined to ascertain, with reference to Sections 1 and 2 of the Code, and Sections 3 and 4, Act XXIII of 1861, whether the Court has jurisdiction in respect of the subject-matter of the suit.

The Courts have no jurisdiction in respect of claims to vessels or other property on the high seas, the sea-shore forming the limit of their jurisdiction.—Ib. 25th July 1814.

The Courts have no jurisdiction in claims exceeding Rupees 500 for wages due to seamen, such suits being cognizable only by the Supreme Courts on the Admiralty side.—Section LVII, Act I of 1859.

Courts, other than Courts of Small Causes, cannot take cognizance of suits to recover wages, not exceeding Rupees 500, due to seamen, unless referred to them by the Magistrate.—Ib.

Where a debt is payable by instalments, no Court can entertain a suit respecting it unless it have jurisdiction over the whole amount remaining due.—Ib. 9th September 1830.

If the total amount claimed exceed the pecuniary limit of the Court's jurisdiction, the plaint cannot be received, notwithstanding that interest and profits may alone constitute the excess.—S. Let., 30th August 1837.

If want of jurisdiction be discovered after the defendant has been summoned and examined by the Court, the plaint cannot be returned, but the plaintiff may be allowed, under Section 97 of the Code, to withdraw his suit.

A Court of Requests has no jurisdiction unless the defendant be "carrying on some trade or business," mere residence in the Cantonment not being sufficient.—S. Dec. 1854, p. 51.

If the jurisdiction of the Court be once acknowledged, it cannot afterwards be objected to.—I. S. Sel. Dec., p. 34.

If it be found that the same cause of action has been already determined by a Court of competent jurisdiction, the plaint must be rejected at whatever stage of the examination the discovery may be made.—S. Proc., 1st June 1852.

An action of debt upon a bond may be brought, either where the obligation was entered into, or where the obliger may at the time be residing.—S. Dec. 1859, p. 164.

If a person execute a bond binding himself to pay the money borrowed at any port at which the vessel may touch, a suit may be instituted upon the bond in the Court having local jurisdiction at any of such ports, provided the defendant be at the time residing within the limits of its jurisdiction.—S. Proc., 26th August 1860.

A Court is not deprived in its jurisdiction in the matter of a bond by a

stipulation therein that the remedy shall be in a suit in some other Court.—I. S. Sel. Dec., p. 24.*

The Courts have jurisdiction in suits respecting private injuries, arising out of nuisances in public thoroughfares.—S. Dec. 1857, p. 140.

Complaints of the mismanagement of religious or charitable endowments may be preferred either to the Board of Revenue, or, in the form of a regular suit, to the Civil Courts.—Ib. 1858, p. 39.

A Civil Court has jurisdiction in a suit to establish a right to superintend the car festival of a Pagoda, if the office yield any emolument.—Ib. 1856, p. 198.

Claims to succeed to hereditary offices are cognizable by the Courts.—Ib. 1850, p. 122.

KAZI.

A Town Kázi is not vested by law with the power of performing the duties of his office to the exclusion of all other persons, but he may sue for damages if privileges which he may consider to be exclusively his own be interfered with.—S. Proc., 5th January 1841.

A Town Kázi has no authority to enforce the attendance of a witness before him; but he may refuse to verify a document regarding the authenticity of which, from the absence of a witness, he may entertain doubts. Ib.

A Town Kázi cannot compel an unwilling wife to return to or receive her husband, but must refer the husband to a civil suit.—Ib.

It is no part of a Kázi's duty to enforce the Stamp Act; the responsibility of fulfilling its requirements lies upon the parties executing deeds brought to him for attestation.—Ib. 14th December 1860.

LIMITATION.

Every plaint, on its presentation, is to be examined in order to ascertain, with reference to Section 32 of the Code, whether, on the face of such plaint, the suit is not barred by lapse of time.

If the defendant plead that the suit is barred by lapse of time, this question must be determined by the Court before the main evidence in the case can be gone into.—Ib. 1st June 1852.

A suit will not be barred by the Law of Limitation if brought within the prescribed period, reckoned from the date of an admission of the claim by the defendant, though more than that period may have elapsed between the date of the cause of action and that of the admission.—S. Dec. 1853, p. 32; and 1858, p. 93.

* Mere denial by the defendant of the plaintiff's right and title is not sufficient to oust the jurisdiction of the Court.—II. H. C. R., p. 184.

Mere casual presence, or even residence for a temporary purpose without the intention of remaining, is not "dwelling."—Ib. 304. See also I. H. C. R., p. 136. "Cause of action means the whole and every part, and not merely any substantial part, nor the last act which gives the cause of action. (Vide *Madras Times*, 13th June 1866.)

An admission, to prevent the operation of the law for the limitation of suits, must be such as to induce the creditor to refrain from instituting legal proceedings, by holding out a hope to him that his claim will be amicably adjusted.—Ib. 1860, p. 225.

The mere institution of a suit, subsequently withdrawn, does not give a fresh starting point with respect to limitation.—Ib. 1857, p. 169 ; and 1853, p. 56.

A right of action lost under the Law of Limitation during the life-time of the party in whom it originally vested, cannot be revived by his heir after his death.

Oral testimony cannot be admitted to prove the revival of a claim which has been finally rejected by a Court of competent jurisdiction as barred by the Law of Limitation.—Ib. p. 22.

In the case of a landlord and tenant, the Law of Limitation begins to run from the time that the tenant ceases to pay rent.—Ib. 1852, pp. 44 and 71.

Possession, not by the party sued, but by some other person who afterwards relinquishes the land, will not operate against a plaintiff's claim, under the Law of Limitation.—Ib. 1851, p. 256.

In a claim for lands of which possession had been fraudulently obtained, the limitation of time can only be counted against the claimant from the date on which the fraud was discovered.

A suit to recover property wrongfully alienated by plaintiff's mother during his minority must be brought within the time allowed by the law for the limitation of suits, reckoned from the date of plaintiff's coming of age.—Ib. 1860, p. 252.

If a plaintiff's claim to land in the possession of another be disputed, and he states by writing that he contemplates enforcing his claim by action, the Law of Limitation will run against him from that time.—Ib. 1859, p. 10.

In the case of claims founded upon heirship or succession, the Law of Limitation runs from the time when the succession falls to the claimant and he is opposed in entering upon his asserted right.—Ib. 1860, p. 136.

The minority of a party will protect his own share, but not the share of an adult co-parcener, from the operation of the Law of Limitation.—Ib. 1854, p. 173.

A co-sharer is entitled at any time to claim his share, and the Law of Limitation only runs against him from the period when his title is denied.—Ib. 1855, p. 82 ; and 1858, p. 163.

The acquiescence of a party in an arrangement for the liquidation of a debt prevents the operation of the law for the limitation of suits, and preserves to the creditor his right of action.—Ib. 1858, p. 93.

Where a debt is payable by instalments, the Law of Limitation runs from

the date on which each instalment fell due, and not from the date of the first instalment.—Ib. 1854, p. 225; and 1855, pp. 43, 133, and 237.

In suits on bonds or other instruments for the payment of money, the limitation of time is not to be reckoned from the date of execution of the instrument, but from the date on which the money became payable.

If where a mortgagee in possession has recovered the principal sum lent, with interest, from the profits of the land, the owner demands possession, but is put off with excuses, the Law of Limitation will run against the owner's claim from the time of such excuses being made.—Ib. 1859, p. 191.

MOTIONS.

No verbal motion is to be made at the time of putting in any petition, except where it may be desired to obtain an immediate injunction or order thereon, and the party or his Pleader is provided with such authenticated documents as will enable the Court to judge of the emergency.

No verbal motion relating to any suit or petition in which a Pleader may be retained on the other side is to be made in Court, unless at least a day's notice in writing has been given to such Pleader.

ORDERS.

In every civil proceeding, the parties or their Pleaders are to be required to point to the express provisions of the Code upon which they rely; and the Courts are also to specify the particular Sections under which their orders are passed.—S. Proc., 21st April 1860.

Orders passed on petitions are invariably to contain a brief abstract of the contents of the petition, and the grounds upon which the order is based.—Ib. 19th November 1849.

Every order passed by a judicial authority should set forth minutely the matter brought under hearing before him, and the grounds of his decision thereon; and the subject of any prior proceedings or other documents to which he may have occasion to refer, should be in like manner set forth, so that every order may be framed in such a manner that it shall be self-explanatory.—Ib. 17th February 1853.

Orders are generally to be written in the vernacular language of the Judge; but if such language be not English, and the Judge be conversant with English, he may write his orders in English.

Orders not written in the language of the Court need not be translated into that language, unless an authenticated copy be applied for, and the party desire to have it in the language of the Court.—Ib. 20th August 1853.

Orders issued by the superior Courts are merely to be conveyed in proceedings, and not to be accompanied by any precept.

PAUPERS.

A person who voluntarily divests himself of property, or refuses to take possession of it, cannot be allowed to sue as a pauper.—Ib. 13th March 1823.

The possession of property by the husband is no bar to the admission of a suit in *formâ pauperis* on the part of the wife.

The possession of property by the father is no bar to the admission of a suit in *formâ pauperis* on the part of a son against his father.

The possession of property by a guardian is no bar to his being admitted to institute a suit in *formâ pauperis* on behalf of his ward.

It is not necessary, on the death of a pauper-plaintiff, to direct that the suit shall abate; his heir may be allowed to carry on the suit, provided he first prove his pauperism.

If fresh defendants be brought into a suit, instituted by a pauper-plaintiff, they are entitled to show cause against his being allowed to sue in *formâ pauperis*.

If a plaintiff, who was originally admitted to sue as a pauper, become possessed of property while the suit is pending, he may be required to put in the requisite stamps, and judgment may be given against him if he neglect to do so.

Paupers can only obtain authenticated copies of decrees on the same conditions as other suitors.—Ib. 10th November 1860.

In pauper suits, as in others, the plaintiff must pay into Court the expenses of his witnesses before the summons can be served.—Ib. 15th April 1860.

If a pauper-plaintiff retain a Pleader, he must provide him with a vakâlatnama on the usual stamp.—S. Dec. 1852, p. 76.

PLAINTS.

The verification of the plaint, under Section 27 of the Code, need not be made by the plaintiff in Court.—S. Proc., 2nd February 1860.

If the plaintiff be absent, the plaint need not invariably be verified by his authorized agent, but may be verified by any one personally acquainted with the facts of the case.

Persons competent to subscribe and verify plaints on behalf of plaintiffs under Section 28 of the Code, are those who are able to depose to the facts of the case and have a knowledge of the circumstances forming the ground of action which the plaintiff does not possess; as, for instance, shopmen employed in the sale of the goods of their employers, and the like; not Mooktears, or other such agents.—Ib. 19th March 1860.

The plaint in such cases may be brought already subscribed and verified; but will be liable to rejection, if there should be no cause for allowing any person other than the plaintiff to perform those acts, or if the person by whom they may have been performed should not be considered competent for the purpose.—Ib.

Whenever a plaint is rejected, a judicial order is to be recorded in the diary of the Court, and the original plaint is also to be placed among the records, but not to be numbered or entered in the Register.

Whenever a plaint is returned, the grounds and date of return are to be endorsed on the back of such plaint, and signed by the Judge, a copy of such endorsement being placed on record.

Whenever the Court may allow a plaint to be amended under Sections 29, 31, or 32 of the Code, a time is to be fixed, and the plaint rejected if not amended within such time.—Ib. 17th August 1860.

Where two or more causes of action have been joined in the same plaint, and a separate trial of each is ordered under Section 9 of the Code, fresh plaints are to be taken; but if the original stamp be sufficient to cover the whole claim, such additional plaints may be written on plain paper.—Ib. 16th April 1860.

A plaintiff cannot be fined under the Code, though the Court may consider his claim to be groundless and vexatious; but he may be prosecuted under Section 209 of the Penal Code.—Ib. 1861, pp. 16 and 52.

PLEA.

Where the defendant pleaded that he had paid his Pleader the full fee, it was held that he could not at the same time plead that he never agreed to pay such fee; and the plea of payment was held to be conclusive as to the agreement to pay.—S. Dec. 1860, p. 189.

If a party plead that, though once in possession as mortgagee, he afterwards purchased the land, he cannot, in the event of his failing to prove the purchase, be allowed to fall back upon the plea that the mortgage bond had been forfeited.—Ib. p. 39.

Where the plaintiff had in the Court of First Instance rested his claim to inherit property upon an adoption, he was not allowed in appeal to urge it upon the ground of his natural relationship to the deceased.—S. Proc. 1860, p. 171.

A plaintiff who had in the original suit based his claim to succeed to a Zemindary, on his being son of the Pattaba Stri, or royal wife of the Zemindar, was not permitted in appeal to rest his claim on the fact of his being the Zemindar's eldest son.—Ib. p. 136.

A new plea, inconsistent with the defendant's pleadings in the Court of First Instance, cannot be admitted in appeal.—Ib. p. 243.

Where the defendant had in the Court of First Instance not pleaded to plaintiff's claim for future instalments on a bond, he was not allowed, in appeal, to take the objection that no cause of action had yet arisen in respect of those instalments.—Ib. p. 157.

Where the defendant had in the original suit pleaded to the jurisdiction of the Court solely on the ground that he was not resident within its limits, he was not allowed to urge, as an additional plea in appeal, that he had divested himself of all the real property he had possessed within those limits.—Ib. p. 139.

No ground of defence, not urged in the Court of First Instance, can be taken in appeal.—Ib. 1858, p. 210.

Where the defence was that the suit was barred by a former decree, and the plaintiff in appeal disputed the jurisdiction of the Court passing that decree, such objection was not allowed because it had not been raised in the original suit.—1 Sel. S. Dec., p. 428.

PLEADERS.

No Pleader, other than the Government Pleader, will be heard in any suit or other proceeding, unless he produce a Vakálatnama duly authorizing him to appear on behalf of some party therein.

By the term “duly authorized” Pleader is meant a regularly admitted practitioner; a suit cannot be carried on through a Mooktear.—Sud. Dec. 1858, p. 80.

Where a person is a party in two or more connected cases, he must execute a Vakálatnama in each case, notwithstanding that he may retain the same Pleader in all.

Every Vakálatnama must be executed by the party himself, and must be signed before, and authenticated by, some judicial functionary.

Where the party is exempted from personal attendance in the Courts, or unable, from sickness or other cause, to attend, the execution of the Vakálatnama may be verified by the attesting witnesses in the presence of the judicial functionary.—S. Proc., 1st December 1858.

No Vakálatnama is to be authenticated, unless the Pleader's name be inserted therein previous to its execution.—Ib.

No Vakálatnama will be filed, unless it be noted thereon, in the handwriting of the Pleader to whom it is executed, that it has been “accepted” by him.

Where the party may afterwards retain additional Pleadors, he may either execute a fresh Vakálatnama, to be signed by all the Pleadors by whom it is accepted, and to be substituted for the original Vakálatnama; or he may execute a separate Vakálatnama to the additional Pleadors.—Ib. 24th July 1851.

Any Pleader authorized by a party to receive money on his behalf is to produce a Vakálatnama expressly giving him such authority.—Ib. 26th June 1855.

A Pleader retained by one party in a suit is not precluded from afterwards accepting a Vakálatnama from the other party if the same cause or interest again come under adjudication.—Ib. 5th November 1859.

A Pleader retained in a suit cannot afterwards appear for the same client in an appeal from an order passed in execution of the decree in such suit, unless he put in a fresh Vakálatnama.—Ib. 17th August 1860.

If a Pleader be retained by the defendant, the suit cannot be heard and

decided *ex parte* during the absence of such Pleader on leave.—Sud. Dec. 1851, p. 127.

Under special circumstances the party's Pleader will be allowed to avail himself of the assistance of any other Pleader, and such Pleader will, in the discretion of the Court, be heard in addition to, but not in lieu of, the Pleader retained by the party.

The Vakeels of a Zillah Court are entitled to practice in all Courts subordinate to the Zillah Court.—H. C. Proc., 23rd November 1865.

A Pleader retained in any case has discharged his duty to his client on the decree being made; and is not bound to appear on any application for review of judgment without further instructions. But if prepared to appear, he may do so without a fresh vakalatnama: provided that if any such Pleader take any step in the review, it will be incumbent upon him to appear at the hearing.

Any Pleader leaving the Court for a longer period than six weeks will be required to arrange with his clients to appoint some other Pleader to appear in his stead in any cases in which he is retained, and which are likely to be brought on for hearing during his absence.

Pleaders will not be allowed access to the original records of suits, but will be required to provide themselves with private copies under the rules relating to copies.—S. Proc., 22nd June 1859.

No Pleader will be allowed to speak out of his turn, at the hearing of a case, except for the purpose of taking a preliminary objection, correcting a mis-statement of facts, putting a necessary question, or removing a misconception respecting some argument or assertion put forth by himself.

All observations which a Pleader may desire to make at the hearing are to be addressed to the Court, and never to the Pleader on the other side.

At the hearing of cases in which Pleaders are retained on both sides, the Pleader for the plaintiff or appellant, as the case may be, will have the right to begin; the Pleader for the defendant or respondent will answer; and the plaintiff's or appellant's Pleader will be entitled to reply.

After the Pleaders on both sides have been heard, no Pleader is to offer any remarks except in answer to questions put by the Court; and after judgment given, no Pleader will be allowed, under any circumstances, further to touch upon the matter adjudicated.

A party who has retained a Pleader to appear for him cannot be heard in person, unless he first withdraw the vakalatnama.—Ib. 15th March 1821.

A party is at liberty to dispense with the services of his Pleader whenever he thinks fit, without assigning any reason.—Ib. 19th November 1849.

All powers conferred on a Pleader cease upon the death of the person executing the vakalatnama.—Ib. 22nd March 1808.

An agreement to pay a fee to a Pleader is not required by law to be expressed in writing.—S. Dec. 1860, p. 189.

The only mode open to a party to obtain redress for any injury he may have sustained by the neglect of his Pleader is to institute a regular suit for damages.—S. Let., 4th March 1850.

Pleaders are liable to be sued by their clients for gross neglect in the discharge of their duty.—1 Sel. S. Dec., p. 150.

Complaints of clients against their Pleaders of wilfully delaying or refusing to carry on their suits, or of having wilfully misled them by a dishonest opinion, may be represented by a petition to the Court, but damages cannot be recovered except by a regular suit.—S. Proc., 16th November 1840.

A Civil Judge is competent, under Clause 1, Section X, Regulation XVI of 1816, to remove a Pleader from office without reference to the Sudder Court.—Ib. 12th March 1861.

Appeals presented to the Sudder Court by Pleaders dismissed by the lower Courts are to be submitted through the Civil Judge, and orders will be passed thereon by the Sudder Court in the character of a supervising body, without any hearing in open Court.—Ib. 9th June 1858.

PLEADERS' GOMASTAHS.

No person will be allowed to act as the Gomastah of any Pleader in the Sudder Court, until his name has been entered, with the Registrar's permission, in a list of such persons to be kept in the office.

Pleaders will be expected to employ as their Gomastahs persons of respectability, and to adopt every means in their power to prevent them from exacting money from the suitors.

No Pleader's Gomastah is, upon any pretext whatsoever, to enter any other room than the Court, and no such Gomastah is to approach the Pleader's table in Court, except when expressly called by a Pleader, or for the purpose of handing papers to the Pleader.

Memoranda given by Pleaders to their Gomastahs are to be delivered to the Serishtadar; and he is to note on the same the information required by the Pleaders, and return them to their Gomastahs.

PLEADINGS.

Pleadings, i. e., complaints, appeals, petitions, and all other written applications, will only be received in open Court, and from the party himself, or his duly authorized Pleader or recognized Agent, or from his private Agent, if the party be an officer or soldier.

No anonymous petition is to be brought on the file. No pleading will be filed or noticed which is forwarded through the post, or communicated by Telegraph. No pleading will be entertained which is couched in language disrespectful to the Court, or to the Judge of any other Court, or to any other public officer, or which contains terms of reproach against the other

party. No pleading will be registered which is written in an illegible hand or in an unintelligible style. Verbal corrections may at any time be made in pleadings, with the permission of the Court.—S. Let., 28th July 1837.

POSTPONEMENT.

If a plaintiff leave his usual place of abode without instructing his Pleader, and on the day fixed for the hearing the Pleader be unprepared to argue the case, the Court may, under Section 114 of the Code, pass judgment against the plaintiff by default, unless it see fit to adjourn the hearing under Section 146.

If a Pleader be retained in due time, but be unprepared to argue the case at the hearing in consequence of his name having been omitted when the case was posted, the hearing will be postponed.

A Pleader putting in a vakálatnama in a case already posted, will not be entitled to have the hearing postponed, on the ground that he has not had time to master the case; but the Court may, if it see fit, postpone the hearing.

Where there is another Pleader retained on the same side, inability of one of the Pleaders to attend on the day of hearing will not be sufficient ground for the postponement of any case already posted.

PRINCIPAL SUDDER AMEENS.

A Principal Sudder Ameen has no power to receive or determine any appeal from the decision of a Collector, or other European officer of Government, but he may entertain a suit in which such officer is a party.—S. Proc., 14th December 1849.

PRINTING CHARGES.

Every Memorandum of a Regular Appeal presented to the Sudder Court must be accompanied by the charge for printing at the rate of eight annas for every roll of the appeal, and four annas for each roll of the judgment and decree of the Court of First Instance.—Ib. 21st April 1860.

Every application for the admission of a special appeal must be accompanied by the charge for printing, at the rate of eight annas for every roll of the application, and four annas for each roll of the judgment and decrees of the lower Appellate Court and Court of First Instance.—Ib.

Every appeal from an order must be accompanied by the charge for printing, at the rate of eight annas for every roll of the appeal, and four annas for each roll of the enclosures.

PROCESS.

Persons of rank are not to be summoned, unless their evidence is material; and when their attendance is indispensable, they are to be treated with the respect and consideration due to their position in life.—Ib. 1st March 1827, and 9th October 1835.

When the evidence of any person, in the service of Government, is material to the issue of any suit, the Court should ascertain from the head of the Department in which the witness is employed, the date on which he can be allowed to attend, and should issue the summons accordingly.—Ib. 25th August 1823.

The practice of collecting from parties in suits, naming public servants as witnesses, such sums as may be equal to the pay of such servants during their absence from duty, is prohibited.—Ib. 2nd October 1860.

Subordinates in public offices cannot be summoned to produce official papers: application should be made, under Sec. 138 of the Code, to the head of the Department to which such papers appertain, requesting him to send them for the Court's inspection. Application for revenue papers must in all cases be made to the Collector of the District.—Ib. 19th March 1860.

If a defendant be out of the way on account of business, or on any *bond fide* ground, the suit against him should stop; but if the plaintiff be able to satisfy the Court that the defendant's absence is fraudulent, a special service should be substituted for the one ordinarily provided.

The notice issued under Section 345 of the Code is to the respondent only; appellants are required to take notice of all orders of the Court fixing dates for the hearing, or adjourned hearing of appeals, without being served with any special notice.—Ib. 20th September 1860.

Notice of the day fixed for the hearing of the appeal should, under Section 345 of the Code, be affixed in the Appellate Court as soon as possible after the appeal is registered, and while the appellant may be presumed to be still in Court; the date being fixed according to the state of the file, and the hearing being afterwards adjourned, if necessary, to a subsequent date.—Ib.

The practice of serving notice upon the respondent one month before the date of hearing is consistent with the intent of Section 345 of the Code, as the appellant will have left the Court and cannot know when his case is to come on.—Ib. 24th December 1860.

Notices to respondents should always be issued immediately upon an appeal being registered, and in cases where the Government has undertaken the defence of the suit in the Court of First Instance, sufficient time should be allowed to enable the Collector to obtain the instructions of the Board of Revenue and Government as to appearing and defending the appeal.—Ib. 7th December 1860.

In suits against the Government not less than three months should be allowed between the date of the summons and that fixed for the hearing.—Ib. 10th September 1861.

Where a peon is entrusted with the service of several processes in separate suits, due allowance must be made in fixing the date for the appearance

of parties residing in the most distant village, for the time which will be occupied by the peon in serving processes at intermediate villages.—Ib. 7th February 1861.

Where it may be necessary to serve a summons on a party residing in any of the Straits Settlements, a period of not less than three months is to be allowed for the appearance of such party.—Ib. 6th April 1857.

Where a suit is instituted in a District Moonsiff's Court against the Government, the summons should be served under Section 52 of the Code on the Government Pleader of the Civil Court.—Ib. 17th January 1860.

The serving officer is to be provided with a separate copy of the summons for each of the witnesses.—Ib.

As a general rule, no attestation should be required, but it will be in the discretion of the Court in any particular case to require it, as, for example, where a second summons has to be issued, under Section 112, in consequence of there being no satisfactory proof of the first having been duly served.—Ib. 19th March 1860.

Where it is alleged that the defendant has refused to sign the acknowledgment, the due service of the summons may be proved by the deposition of the serving officer.—Ib.

The evidence of the serving officer, if clear and positive, will generally be sufficient proof of service to justify the Court in proceeding to hear the suit *ex parte* under Section 111 of the Code; but where it may leave a doubt on the mind of the Court whether the service was really effected, the Court may direct a second summons to be issued under the following Section.—Ib.

In attaching moveable property before judgment, the Ameen should be directed to bring the property to Court and deliver it into the custody of the Názir or Head Gomastah, unless it be of a perishable nature, in which case it may be sold under Section 250, as in execution.—Ib. 4th December 1860.

Females entitled to the privilege granted by Section 21 of the Code are not liable to arrest so long as they remain in their private apartments.

Females exempted from personal appearance in Court are liable to arrest for debt if they leave the precincts of their private apartments; but process should first be issued against their property.—Ib. 14th September 1859.

A party in attendance on a Court on bail to answer a criminal charge is not liable to arrest under civil process.

Parties and witnesses in any civil or criminal case pending before any Court of Justice are exempt from arrest under civil process while in attendance on, or going to, or returning from, such Court of Justice.

Judicial processes, other than warrants of arrest, requiring to be served within the limits of the Supreme Court, are, in addition to the certified trans-

lation in English, to be accompanied by copies of the process and translations for each person upon whom service is to be effected.—Ib. 5th Oct. 1850.

Where judicial process may be sent to the Sheriff of Madras for execution, the sum of two rupees is to be levied from the party at whose instance the process is issued for every summons, notice, or proclamation, and four rupees for every warrant of arrest or execution; and the sums so levied are to be credited to Government.—Ib. 19th September 1853.

Warrants of arrest are not to be sent by post but entrusted to the officer into whose custody the person to be arrested is to be delivered by the Deputy Sheriff.—Ib. 14th June 1841.

Processes requiring to be executed within another jurisdiction under Sections 59 and 158 of the Code are to be forwarded by post at the expense of the parties on whose motion they are issued; but no such process is to be issued until the party provides the requisite postage stamps both for its transmission and return, in addition to the regulated charge for serving the process.—Ib. 25th February 1860.

District Moonsiffs may transmit processes direct to any Civil Court for service by that Court and also to any other Court, without the intervention of any Civil Court.—Ib. 17th August 1860.

Where, however, a District Moonsiff has to procure service of a process on an officer or soldier, or on a person residing within the limits of the jurisdiction of the Supreme Court, he is to forward the process through the Civil Judge.—Ib.

If any judicial process has to be executed within the limits of a Military Cantonment, it should be accompanied by a letter to the Commanding Officer explaining the nature of the process, and requesting him to have it enforced.—Ib. 29th October 1844.

Processes issuing from the Civil Courts of Calicut, Coimbatore, Cuddalore, Madura, Negapatam, Tanjore, Tellicherry, Tinnevely, and Trichinopoly, and requiring to be served on parties residing in Ceylon, may be transmitted, (accompanied by English translations) direct to the District Judges in that Island, provided the parties be resident within the jurisdiction of Colombo, Galle, Jaffna, Kandy, Kornegalle, or Trincomalee District Courts, and the same rule will apply to Commissions for the examination of witnesses.—Order of Government, 17th September 1858.

Processes, and Commissions for the examination of witnesses, requiring to be executed in any of the Straits Settlements, are to be transmitted to the Governor of Prince of Wales' Island, Singapore, and Malacca, accompanied by a letter requesting that the same may be duly executed and returned.—S. Let., 22nd July 1850.

Commissions for the examination of witnesses residing in foreign European settlements, or in the territories of Native States, may, under the order of Government dated 5th February 1830, be issued by Civil Judges to the

British Representatives in such settlements or territories.—S. Proc., 15th February 1830 ; and 11th May 1831.

PANCHAYATS.

An application under Section 327 of the Code to give effect to a private award, should be made to the Court having jurisdiction with reference to value, and should be brought on the file as a regular suit.

No person who is likely to be required to give evidence in a suit referred to arbitration should be allowed to serve as one of the arbitrators.—Ib. 19th February 1838.

Whenever a subordinate public servant is required to serve as an arbitrator, the head of his department is to be requested to mention the most convenient day for his attendance, and the summonses to the several arbitrators are prepared accordingly.—S. Let., 15th October 1824.

If a member of a Panchayat die before the award is given, the Panchayat is to be considered as *de facto* dissolved, and the agreement to abide by its award to have become null and void.—S. Proc., 27th March 1828.

Upon the dissolution of a Panchayat by the death of one of its members, the parties may either submit the matter in dispute to a new Panchayat or institute a regular suit respecting it.—Ib.

The surviving members of any Panchayat, so dissolved, may be appointed to a new Panchayat, if one be desired by the parties.—Ib.

Where a Panchayat is dissolved on the death of one of its members, any depositions taken before it, and duly authenticated, may be taken into consideration by any Panchayat subsequently appointed on the application of the parties.—Ib.

If application be made to set aside an award on the ground of corruption or misconduct on the part of the arbitrators or umpire, the charge must be specific in its terms.

Appeals against the proceedings of a Village Panchayat for partiality, preferred under Section XI, Regulation V of 1816, lie to the Subordinate Judge or Principal Sudder Ameen, by whom a report of the case is to be made to the Civil Judge.—Ib. 4th March 1844.

A Civil Judge is competent to issue orders to correct errors in the proceedings of a Panchayat assembled by a District Moonsiff under Regulation XII of 1816.—Ib. 28th February 1828.

Appeals from the decisions of District and Military Panchayats lie to the Civil Judge.—Ib. 4th March 1844.

A decree passed by a District Panchayat under Section XV, Regulation V of 1822, passed without any further evidence than what is contained in the proceedings before the Tahsildar, is irregular and invalid.—Civilian's Remembrancer, § 83.

RAZEENAMAH.

Execution cannot be issued upon a Razeenamah unless the terms of it are embodied in a decree of the Court.—II. H. C. R., p 305.

A Court cannot prevent parties from agreeing to any legal terms of compromise, or compel them to proceed with a suit when they desire privately to adjust.—S. Proc., 17th August 1838.

A suit may be adjusted by Razeenamah between the plaintiff and some of the defendants, and yet proceed as regards the other defendants.—Ib. 10th July 1827.

With any arrangement the defendant may have made with the plaintiff and his other creditors subsequent to the institution of the suit, the Courts have no concern, their duty being simply to dispose of the present suit.—S. Dec., p. 24—5.

If a suit be privately adjusted by some of the parties, the judgment of the Court must be confined to a decision of the claim as it regards the remaining defendants.—Ib. 1851, p. 1.

No Razeenamah can be received and filed unless it be produced in Court by both parties to the suit or their Pleaders, and there declared to have been executed with their free consent.—Ib. No. 4 of 1838.

If a Razeenamah be filed, it takes the place of a judicial award for the debt, and the question of the reality of the debt cannot be entered upon.—S. Proc., 10th April 1854.

A suit cannot be withdrawn after a decree has been passed, but the parties may enter into a Razeenamah notwithstanding such decree.—S. Dec. 1854, p. 69.

A Razeenamah can only be filed in the Court in which the suit to which it relates is pending.—S. Proc., 2nd September 1846.

The litigant parties in a suit referred to a Panchayat under Regulation XII of 1816 are at liberty to settle the matter in dispute by Razeenamah.—Ib. 28th February 1828.

Razeenamahs, too indefinite in their terms to be capable of execution, are not to be received.—Ib. 12th June 1843.

No Razeenamah can be received and filed in Court which contains matter forming a distinct or additional demand, and not in any way involved in the suit.—S. Let., 31st March 1836.

A Razeenamah cannot be received and filed if it be entered into by any person not a party to the suit.—S. Dec. 1851, p. 167.

If a Razeenamah put in by the parties is, on the face of it, clearly unjust, the Court may refuse to file it.—S. Proc., 12th November 1834.

A Razeenamah cannot be filed if it contain stipulations as to payment of the Government revenue, and possession for a limited period, because it would involve conditions which the Court could not enforce.—Ib. 16th November 1836.

A Razeenamah entered into by one plaintiff, when the right of recovery is in another plaintiff, is inoperative.—S. Dec. 1859, p. 193.

A Razeenamah filed in Court cannot be set aside on the plea, raised by one of the parties, of error in judgment in agreeing to its terms.—Ib. 27th August 1849.

A Razeenamah can only be set aside upon positive proof of fraud, and not upon mere suspicion of fraud.—Ib. No. 87 of 1844.

The parties to a Razeenamah filed in Court, though mutually desirous of altering its terms, cannot do so without first obtaining the permission of the Court.—S. Proc., 26th February 1849.

Where the parties are at variance as to the purport of a Razeenamah, the Court may summon and examine them, and decide what shall be considered its true meaning.—Ib. 18th September 1848.

Where application is made for execution of a Razeenamah, and the Razeenamah does not clearly specify the property to be divided, or its value, or the parties in whose possession the property is, evidence may be taken on these points.—Ib. 20th October 1834.

The Court cannot refuse to enforce a Razeenamah duly executed and filed in Court, notwithstanding that a suit may have been instituted to set it aside; but before enforcing it, the Court may require the party to furnish security for the fulfilment of any decree that may be passed in the pending suit.—Ib. 24th October 1860.

RECORDS.

No party or Pleader will be allowed to enter the Record room, or have personal access to any document on the records of the Court: but such documents may be inspected in open Court at the hearing of the case.

Pleaders should require their clients to furnish them with private copies of all material parts of the records of suits in which they are retained.—Ib. 5th September 1859.

REGISTRATION OF DEEDS.

A Registrar of deeds cannot refuse to register an instrument if in proper form; and he is not competent to enquire into the authenticity or otherwise of documents brought to him for registration.—Ib. 21st February 1848.

Depositions should not be taken from witnesses to documents brought for registration; it being sufficient if the witness, on having the deed shown to him, can declare on oath or affirmation that he was present at the execution thereof, and that the signatures are genuine.—Ib. 29th March 1858.

A registered deed of sale invalidates one not registered, except where the purchaser colludes with the vendor and has notice of the previous unregistered deed.—S. Dec. 1855, p. 233; and 1859, p. 143.

A registered deed is by law allowed priority over one not registered, only if its authenticity be established to the satisfaction of the Court.—Ib. 1860, p. 70.

* Vide new Registration Act XVI of 1864.

A registered deed of sale does not invalidate a previous unregistered mortgage.—Ib. 1851, p. 149.

Registry by the Collector cannot confer, nor can the want of registry take away a title to landed property.—S. Proc., 17th September 1832.

REVIEW.

A mere error in the table of costs may be rectified by the chief ministerial officer, with the permission of the Court; and forms no ground for review of judgment.

Where the error is one the correction of which cannot affect the interest of either party, the Court which passed the decree may of its own motion review its judgment, without any application from the parties.—Ib. 29th March 1860.

Applications for review of judgment will not be received unless presented by the party in person, or the Pleader, if any, previously heard in the matter.

No Pleader will be heard on a petition of review where the party appeared in person at the original hearing of the case.

Every application for review should be heard on the next Court day but one after its presentation. If the applicant should then fail to satisfy the Court that there are sufficient grounds for a review, the application will be finally rejected. If the review desired appear to the Court to be necessary, a notice is on the same day to be issued, at the applicant's expense, to the other party, fixing a date on which he may appear and be heard in support of the decree; and a final order is to be passed on the date so fixed.—Ib. 6th September 1860.

It is no ground for review of judgment in a regular appeal that the Pleader was not fully prepared to meet the arguments of the other side at the hearing, either as to the law or to the facts of the case.—Ib. 18th December 1858.

It is no ground for review of judgment that the decree is opposed to a former ruling, if such ruling was under consideration when the decree was passed.—Ib.

A person who does not appear when the case is before the Court on appeal, cannot be heard on petition for review of judgment, though his interests be for the first time prejudicially affected by the decree of the Court.—Ib. 24th December 1859.

A petition for review of an order rejecting a special appeal cannot bring under consideration grounds not originally urged.—S. Dec. 1858, p. 198.

Where an application for review of judgment may have been heard and rejected, all subsequent applications from the same party will be refused.

The Courts may receive and file petitions for review of their orders, and may amend any evident error or omission therein, after notice to the other party.

A Judge having once passed an order on an application for execution of a decree, has no authority to re-investigate the case under Section 376 of the Code, and pass a second order directly opposed to the one first made.—S. Proc., 24th April 1861.

A Judge is merely authorized to correct errors or omissions arising from inadvertence or an oversight: no order can be reversed by the Judge by whom it was passed.—Ib.

SECURITY.

There is no summary remedy against losses arising from the insufficiency of security pronounced by the Názir or other officer of the Court to be good and sufficient for the fulfilment of the decree: the only remedy is by a regular suit.

SMALL CAUSES.

A special appeal lies under Section 27, Act XXIII of 1861, if the aggregate amount sued for exceeds 500 Rupees, though the suit be brought on two or more distinct bonds, each of which embraces a smaller sum than Rupees 500.—Ib. 31st August 1861.

STAMPS.

The valuation of a suit will depend on the value of the plaintiff's claim only, and not on what the plaintiff would become entitled to if the defendant's documents should be invalidated.—S. Dec. 1858, p. 164.

Where a plaintiff becomes entitled to a larger share of the estate than at first sued for in consequence of the death of a co-parcener while the suit is pending, his plaint should not be rejected, but he should be allowed to put in additional stamps.—Ib. p. 103.

In suits to recover possession of trees, the stamp duty is to be calculated on the value of the trees, and not upon one year's produce.—S. Proc., 24th November 1850.

If delivery of immovable property be ordered, and the decree-holder contest the right of a person other than the defendant, claiming to be in independent possession of such property, his petition, under Section 229 of the Code, need not be written on the stamp required for a plaint.—Ib. 17th January 1860.

If a person dispossessed of immovable property dispute the right of the decree-holder to be put in possession of such property, his application to the Court under Section 230 of the Code may be on a stamp of the value required for petitions.—Ib.

The costs awarded by the lower Court are not to be included in the amount upon which the value of the stamp for the memorandum of appeal is to be calculated.—Ib. 15th February 1828.

In suits preferred direct to District Moonsiffs for reference to District Panchayats under Section XIX, Regulation VII of 1816, institution fees should be levied from the plaintiff, and the amount carried to the credit of Government; but suits referred by Collectors under Section XV, Regula-

tion V of 1822, or Clause 7, Section V, Regulation XII of 1816, to a District Moonsiff, for decision by a District Panchayat, are not liable to any institution fee.—Ib. 3rd November 1857.

The penalty leviable under Section XIII of the Stamp Act upon unstamped or insufficiently stamped documents executed prior to the date on which the Act came into operation, is to be calculated upon the stamp duty which was required by the law in force at the date of the execution of such deeds.—Ib. 27th May 1861. (But see Act X of 1860.)

A deed executed on unstamped or insufficiently stamped paper from any other than the causes described in Clause 1, Section XIII of the Act, cannot be received in evidence, even on payment of the penalty specified in Clause 2.—Ib.

Bills of Exchange and Receipts for money executed before the Act came into operation, are receivable in evidence without payment of penalty, if for sums below Rs. 64; if above that amount, and unstamped or insufficiently stamped, penalty must be paid on them under Section XIII.—Ib. and 16th July 1861.

As hoonadies were not required under the old law to be stamped, no penalty is necessary to render admissible in evidence any unstamped hoondee drawn before the new Act came into operation.—Ib. 20th March 1861.

Deeds on which penalty has been paid do not require to be impressed with a stamp under the provisions of Clause 5, Section XIII of the Act, before being received in evidence by the Court in which they are first tendered; such deeds need not therefore be sent to the Collector for this purpose by the Court: but they may be so taken by the parties, if they see cause for having them stamped after they have served the purpose for which they were first tendered in Court.—Ib. 23rd May 1861.

Where penalty had been paid upon a bond executed prior to the passing of the new Stamp Act, the Sudder Court held that the bond was on the same footing as one duly stamped, and that it might be transferred by endorsement without any stamp.—Ib. 1st February 1861.

Bonds executed within the territories of the Rajah of Tanjore prior to their assumption by the British Government not having been liable to stamp duty under the old law, such bonds, though unstamped, are receivable in evidence without payment or penalty.—Ib. 15th April 1861.

Receipts given by the Courts for sums deposited by parties, or by parties for sums disbursed by the Courts, are exempted from stamp duty by the general exemption to Schedule A of the Stamp Act.—Ib. 27th October 1860.

An acknowledgment given by a party to his Pleader, for money received from the Court under a vakalatnama, must bear a stamp.—Ib. 26th July 1861.

Where the instrument was a contract for delivery of goods, combined with a receipt for a portion of the price, the Sudder Court held that, as such

contract, it was exempt under the second of the exemptions to Article 1, Schedule A ; but that, viewed as a receipt, it should bear a stamp.—Ib. 5th August 1861.

The copies of documents referred to in Section 39 of the Code are not those authenticated copies to which the Stamp Act relates. Being lodged merely in the interval between the institution of the suit, and its hearing, when the originals by Section 128 are to be produced, if not already filed, they may be made on plain paper.—Ib. 27th November 1860.

Where an exhibit is one required to be stamped, but bears no stamp or an insufficient stamp, no copy of it can be received under Section 39 of the Code until the penalty due on the original has been paid.—Ib. 16th April 1860.

All sums levied by District Moonsiff, as deficient duty and penalty, should be forwarded by them direct to the Collector, but the Collector may appoint some other than himself to receive the money.—Ib. 17th August 1860.

Razeenamahs being chargeable as petitions, and petitions presented to District Moonsiff's Courts, in relation to suits of an amount or value less than fifty rupees, being exempt from stamp duty under the first general exemption to Article 5, Schedule B of the Stamp Act, Razeenamahs filed in such suits are likewise exempt from stamp duty.—Ib. 1st August 1861.

Judgments and decrees do not fall under the designation of judicial proceedings; and under the terms of Article 2, Schedule B, authenticated copies of them, when the value of the claim does not amount to fifty rupees, may be given on plain paper.—Ib. 13th November 1860.

No exemption being made in the Stamp Act in favor of paupers, they cannot produce any other than stamped copies of decrees in any Court of Justice.—Ib. 10th November 1860.

If a plan be put in by a party as part of, and in explanation of his pleading, it must be either drawn on stamped paper or accompanied thereby.—Ib. 25th February 1858.

If the suit be of an amount or value less than fifty rupees, the application for execution of the decree may, under the general exemptions to Article 5, Schedule B of the Stamp Act, be on plain paper, notwithstanding that by the addition of interest and costs the application embrace a larger sum than fifty rupees.—Ib. 27th October 1860.

If the value of the suit amount to fifty rupees, the application for execution of the decree must be on a stamp, though such application be for a less sum than fifty rupees.—Ib.

Where parties give security for the amount of decrees, the bond in suits amounting to fifty rupees is to be on the stamp required for petitions, if the security be furnished under special order of the Court, or on the same stamp as other bonds, if it be executed between the parties, without the intervention of the Court.—Ib. 23rd October 1860.

If the date fixed in a summons for the appearance of a defendant be for the final disposal of a suit, and the suit be compromised before such date, the plaintiff will be entitled, under Section 98 of the Code, to receive back the full amount of stamp duty paid on the plaint.—Ib. 16th April 1860.

If a plaint be returned as not falling within the Court's jurisdiction, and the subject-matter thereof be afterwards privately adjusted, the stamp duty cannot be refunded.—Ib. 5th June 1860.

There is no provision for return of the stamp duty paid on an appeal by the defendant in a suit instituted in *forma pauperis*, where the decree in such a suit is reversed by the Appellate Court.—Ib. 31st January 1861.

No provision is made in the new Stamp Act for the return of stamp duty by the Sudder Court "in all cases where it may appear just and proper."—Ib. 17th January 1861.

VILLAGE MOONSIFFS.

Village Moonsiffs, and District and Village Panchayats, have no jurisdiction in suits for damages.—Ib. 19th March 1824.

The decrees of Village Moonsiffs can only be enforced against the personal property, and not against the person of the debtor.—Ib. 24th December 1829.

The decrees of Village Moonsiffs cannot be carried into execution by any other authority than the District Moonsiff of the jurisdiction.—Ib.

The intention of Section 23, Regulation IV of 1816, is to prevent execution of a Village Moonsiff's decree being suspended, to the detriment of the plaintiff, beyond three months; and not to compel execution within this period, whether the plaintiff wish it or not. The decree may be executed at any time within the period allowed by the Law of Limitation.—Ib. 27th March 1831.

The refusal of a Kurnum to sign the decree of a Village Moonsiff will not vitiate such decree, but his contumacy should be reported to the Collector in order to his removal from office.—S. Let., 25th November 1846.

VILLAGE OFFICES.

A Kurnum, who has cause of action against a servant employed by him, may seek redress in the established Courts.—S. Proc., 6th Jan. 1849.

A Kurnum of a village of which the revenue has been permanently settled cannot be removed from his office, except by a decree of a Court of Civil Judicature.—Ib. 2nd September 1830.

The emoluments of hereditary Village offices, whether in settled or unsettled districts, are, by Section II, Regulation VI of 1831, declared inalienable, and not subject to process of Court.—Ib. 30th August 1851.

Transfers of hereditary Village offices are, under Section IV, Regulation VI of 1831, null and void, unless made in accordance with the provisions of Hindu Law and under the sanction of the Board of Revenue.—Ib.

The emoluments of a Kurnum are inseparable from his office, and are not liable to partition as family property.—Ib.

The office of Kurnum in a settled district cannot be sold in execution of a decree passed against the incumbent.—Ib.

The office of Kurnum in settled districts cannot legally be sold, and therefore no action will lie to recover the same.—Ib.

WITHDRAWAL.

If there be two or more plaintiffs, and one of them withdraw from the suit under Section 97 of the Code, it may nevertheless be proceeded with to judgment as regards the remaining plaintiffs.

WITNESSES.

The Courts cannot dispense with the examination of witnesses cited and relied upon by the parties.—S. Dec. 1856, pp. 38 and 149.

WRITTEN STATEMENT.

No answer, *i. e.*, written replication, can be received from a defendant; but a defendant may, at the first hearing, under Section 120 of the Code, put in a written statement of his own case.—S. Proc., 19th March 1860.

No further time can be allowed for putting in such statement; but the Court may call for one at any time before final judgment.—Ib.

